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No. 80-973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN H. SMITH,
Petitioner

v.

FORD MOTOR COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court, exercising its power to regulate pretrial procedures in the district courts, determine a uniform pretrial procedure in order that trials will be uniformly expedited to the end that litigants, for insubstantial procedural requirements, not be deprived of their cases by undue delay.

2. In a civil case should the Circuit be permitted to reverse a case based on insubstantial procedural requirements for the pretrial conference contrary to the rulings in other circuits, and of the United States Supreme Court, when to do so will cause petitioner to retry his case nearly ten years after injury, the result of which would be to deprive the petitioner of a **speedy civil trial,** as guaranteed to him by the Wyoming State Constitution, as well as to deprive him, because of such delay, of the right to prove any case, now lost by such unconscionable passage of time?

3. Should this Court, recognizing its clear duty to exercise supervisory control over the circuit courts to insure speedy justice recognizing further that specifically in the Tenth Circuit the back-log of cases exceeds one thousand, and leaves litigants waiting over two years for some decisions, take "the bull by the horns" and lay down rules, guidelines, work-load requirements and expectations for circuit judges and take such other steps as in the wisdom of this Court might better insure parties to speedy trials in civil as well as criminal cases.

LIST OF PARTIES

The Petitioner is John H. Smith of Dubois, Wyoming.

The Respondent is Ford Motor Company of Dearborn, Michigan.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	(i)
LIST OF PARTIES	(ii)
TABLE OF CONTENTS	(iii)
TABLE OF AUTHORITIES	(iv)
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
Background — Proceedings	2
REASONS FOR GRANTING WRIT	6
I. Justice Delayed	6
II. Pretrial procedure should not be transformed into a system of "mini trials" that directly contribute to the delay and "log-jammed" dockets in Federal District Court	8
III. Federal District Courts should be encouraged in their effort to adopt efficient pretrial procedures	11
CONCLUSION	16
APPENDICES:	
Appendix A	1a
Appendix B	1b
Appendix C	1c

TABLE OF AUTHORITIES

Cases:	Page
Agrashell, Inc. v. Hammonds Products Company 479 F. 2d 269 (8th Cir. 1973)	14
Berger v. Brannan 197 F. 2d 241 (10th Cir. 1941)	10, 13
Case v. Abrams 352 F. 2d 193 (10th Cir. 1965)	10, 14
Century Ref. Company v. Hall 316 F. 2d 15 (10th Cir. 1963)	15
Coffey v. U. S. 333 F. 2d 945 (10th Cir. 1964)	10, 14
Compagnie National Air France v. Port of New York Authority 427 F. 2d 951 (2nd Cir. 1970)	15
Cruz v. U. S. Lines Company 386 F. 2d 803 (2nd Cir. 1967)	13
Davis v. Duplantis 448 F. 2d 918 (5th Cir. 1971)	5, 13, 14
Delava Turbine, Inc. v. West India Industries 502 F. 2d 259 (3rd Cir. 1974)	14
Edgar v. Slaughter 548 F. 2d 770 (8th Cir. 1977)	9
Ely v. Reading Company 424 F. 2d 758 (3rd Cir. 1970)	11, 13
Fox v. Ford Motor Company 575 F. 2d 772 (10th Cir. 1978)	3
Globe Cereal Mills v. Scrivener 240 F. 2d 330 (10th Cir. 1956)	10, 14
Identiseal Corp. of Wisconsin v. Positive Identification 560 F. 2d 298 (7th Cir. 1977)	9

Cases continued — Page

Jones v. Union Auto Indemnity Association
287 F. 2d 27 (10th Cir. 1961) 10, 14

Kozar v. Chesapeake & Ohio Ry. Co.
320 F. Supp. 335, 374 (D. C. Mich. 1970) 14

Link v. Wabash Railroad Company
370 U. S. 626 (1942) 5, 9, 11

Lynn v. Smith
281 F. 2d 501 (3rd Cir. 1960) 13

Marks & Company v. Diners Club, Inc.
400 F. Supp. 581 (D. C. NY 1975) 14

Monod v. Futura, Inc.
415 F. 2d 1170 (10th Cir. 1969) 10, 14

Moore v. Sylvania Electrical Products, Inc.
454 F. 2d 81 (3rd Cir. 1972) 13

Myers v. Penney Packwoods Home Ownership Association
559 F. 2d 894 (3rd Cir. 1977) 11

McCargo v. Hendrick
545 F. 2d 393 (4th Cir. 1976) 5, 9

National Farmers Organization Inc., v. Oliver
530 F. 2d 815 (8th Cir. 1976) 13

Osborne v. Boeing Airplane Company
309 F. 2d 99 (9th Cir. 1962) 15

Padovani v. Bruchhausen
293 F. 2d 546, 548-49 (2nd Cir. 1961) 9, 13

Pan-American Gas Co. v. Reed
240 F. 2d 336 (5th Cir. 1957) 14

Payne v. S. S. Nabob
302 F. 2d 803 (3rd Cir. 1962) 14

Peter Eckrich & Sons, Inc. v. Selected Meat Company
512 F. 2d 1158 (7th Cir. 1975) 14

Cases continued — Page

Reedy v. Travelers Insurance Company
500 F. 2d 1117 (5th Cir. 1974) 15

Rodriequez v. Ripley Industries, Inc.
507 F. 2d 782 (1st Cir. 1974) 15

Sedowski v. Bombadier Ltd.
539 F. 2d 615 (7th Cir. 1976) 14

Silas v. Sears, Roebuck & Co., Inc.
586 F. 2d 382 (5th Cir. 1978) 9

Simonsen v. Parlo Plastics Company
551 F. 2d 469 (1st Cir. 1977) 14

Spellacy v. Southern Pacific Company
428 F. 2d 619 (9th Cir. 1970) 13

Stewart v. Meyers
353 F. 2d 691 (7th Cir. 1965) 14

Stroud v. B-W Acceptance Corp.
372 F. 2d 185 (10th Cir. 1967) 10, 14

Syracuse Broadcasting Corporation v. Newhouse
295 F. 2d 269 (2nd Cir. 1961) 12, 13

U. S. v. Pirnie
472 F. 2d 712 (8th Cir. 1973) 14

Washington Hosp. Center v. Cheeks
394 F. 2d 964 (C. A. 1968) 14

Washington State Bowling Proprietors Association v. Pacific Line, Inc.
356 F. 2d 371 (10th Cir. 1966) 12

Wright Root Beer Co. v. Dr. Pepper Co.
414 F. 2d 887 (5th Cir. 1969) 14

Statutes Page

Federal Rules of Civil Procedure Rule 16 2

Wyoming Constitution, Article I, Section 8. ..... 2, 6

28 U. S. C. 1254(1) 2

Miscellaneous

HANDBOOK FOR EFFECTIVE PRETRIAL PROCEDURE 9

3 J. MOORE, FEDERAL PRACTICE § 16.02 at 1106 (2d ed. 1974) 9

JOURNAL OF SECTION OF LITIGATION, ABA Vol. 6, No. 3, p. 34 (Spring 1980) 8

4 JUSTICE SYSTEM JOURNAL 245-59 (Winter 1978) 8

64 VA L REV 467-83 (Ap. 1978) 8

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FORD MOTOR COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John H. Smith hereby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (App. A, infra) are reported at 626 F. 2d 784.

A 1978 decision of the Court of Appeals in a related case against Ford Motor Company is reported at 575 F. 2d 774.

After a ten day Jury Trial, a verdict of $800,000 was rendered for the Petitioner. Judgment was entered and Notice of Appeal filed by Ford Motor Company on July 18, 1978. After consideration for two years, the Court of Appeals reversed and remanded for new trial on July 17, 1980. A timely **Petition for Rehearing with a Suggestion for Rehearing En Banc** was denied by the Court of Appeals on September 16, 1980. (App, B, infra).

JURISDICTION

The Judgment of the Court of Appeals was entered on July 17, 1980. The Petition for Rehearing was denied on September 16, 1980. Jurisdiction of this Court is premised on 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Rule 16, Federal Rules of Civil Procedure.
2. Wyoming Constitution, Article I, Section 8.

STATEMENT OF THE CASE

Background – Proceedings

This Petition has resulted from the ruling by the Tenth Circuit Court of Appeals remanding this case for retrial simply because the Circuit Court, substituting its discretion for the District Court, believed that the summary of a witness' expected testimony in a pretrial memorandum was insufficient. This decision was reached in spite of the fact that the presiding trial judge, the Honorable Clarence A. Brimmer, in the exercise of his discretion, found that the Defendant was not surprised

and that the pretrial procedures in the district for summarizing testimony had been followed. Even though the Court of Appeals did not find that Judge Brimmer had abused his discretion, they substituted their discretion for his, reversed a jury verdict of $800,000 and remanded it for a new trial, with Judge Doyle dissenting.

The case was a products liability case for which both sides were well prepared. Petitioner John Smith was a passenger in the front seat of a 1970 Ford Thunderbird which was struck by a pickup truck outside the town of Dubois, Wyoming on January 29, 1973. Although it was a relatively low-speed accident, Mr. Smith received serious permanent injuries, and the passengers in the back seat were killed. The injuries to the back seat passengers and to Mr. Smith had two common aspects. First, they were all severe. Second, the injuries were to the organs that lay within the soft abdominal section of their bodies. Upon investigation, it was learned that the injuries were caused by the fact that the seat belts had been defectively installed in the vehicle. Those defects greatly magnified the forces of collision upon the passengers.

Mr. Smith's lawsuit against Ford Motor Company was the second of two trials against Ford. The first case was a wrongful death action for the passengers in the back seat. It was tried before a jury in same Federal District Court, and resulted in a jury verdict against Ford due to the defective seat belt installation. The case was appealed by Ford to the Tenth Circuit Court of Appeals, and verdict was sustained. *Fox v. Ford Motor Company*, 575 F. 2d 772 (10th Cir. 1978).

Mr. Smith, a surviving husband, filed his lawsuit in the United States District Court for the District of Wyoming on July 30, 1976. The attorneys representing both parties were the same attorneys who had represented the parties in the companion case, and both cases alleged that the seat belts in the Ford Thunderbird were defective. Likewise, as in the companion case, the jury rendered its verdict against Ford, in this case in the amount of $800,000. In total, the attorneys representing the parties in the two cases spent six years in discovery, preparation, trials, and appeals. Liability against Ford was

established by two separate trial juries. At both trials, the expert witnesses were essentially the same: the medical expert for Ford was the same; Plaintiff's engineering expert was the same; the seat belt assembly, in part, was asserted to be the cause of the injuries in both cases.

At Mr. Smith's trial, his treating physician — Dr. James Freston — testified as to the treatment he afforded Mr. Smith as well as to the prognosis that he foresaw for Mr. Smith. Dr. Freston was a department head at the University of Utah School of Medicine, and Mr. Smith's doctor in Montana had referred him to Dr. Freston's care. He was not a so-called "hired expert" but was, instead, a specialist who had been sought out by Mr. Smith's own doctors. Dr. Freston first saw Mr. Smith in January of 1978, and when Mr. Smith's counsel first learned of that referral they notified counsel for Ford. This notification coincided with the scheduled pretrial conference in the case on January 24, 1978 and Dr. Freston was listed by Plaintiff in that memorandum as an expert witness to testify and his involvement in the treatment of Mr. Smith was explained in some detail on the record at the pretrial. Ford was advised that Dr. Freston had just become the treating physician and that he had scheduled surgery for the very week the pretrial was held. Even in light of this advice **Ford chose not to depose Dr. Freston,** even though they had two and one half months in which to do so. The trial commenced March 29, 1978, and the verdict against Ford was rendered April 11, 1978.

At the trial, Dr. Freston was called pursuant to his pretrial designation. As part of his diagnosis he was asked if he had an opinion as to what caused the injuries to Mr. Smith. He gave his opinion that the injuries were caused by the accident. When asked for more details, Ford objected, claiming surprise that the treating physician in a products liability case concerning seat belts might testify that the injuries were caused by the seat belt. The trial court, in the sound exercise of its discretion, found no factual basis for the claim of surprise, overruled the objection, and allowed the testimony. Dr. Freston then testified that the injuries to Mr. Smith were caused by the seat belt. He did not

testify as to whether the seat belts were defective[1]; he merely gave his medical opinion that the seat belts caused the abdominal injuries.

The Court of Appeals, over a very strong dissent, ruled that the opinion should not have been allowed. Mr. Smith requested a rehearing with a suggestion for an en banc panel, pointing out that the Court of Appeals had substituted its own discretion for that of the trial court's even though it had not found that the trial court abused its discretion. The ruling by the Court of Appeals which substituted its discretion for that of the trial court's on pretrial procedure is contrary to this Court's holding in *Link v. Wabash Railroad Company*, 370 U.S. 626 (1942) and contrary to the decisions reached by other Circuit Courts. *McCargo v. Hendrick*, 545 F. 2d 393 (4th Cir. 1976), and *Davis v. Duplantis*, 448 F. 2d 918 (5th Cir. 1971). The Court of Appeals denied the petition for rehearing.

This accident occurred January 29, 1973. An earlier trial on basically the same facts had already occurred. This case has been pending in the District of Wyoming since July 30, 1976, and it has been the subject of pretrial conferences, many depositions, a ten-day jury trial, and an appeal to the Tenth Circuit that took over two years from trial to appeallate decision. Now, because of a listing in a pretrial memorandum that the Court of Appeals found to be insufficient (although the trial court found to be in compliance with the pretrial procedure), the case was scheduled to return to the docket of the District Court for still another pretrial conference and yet another trial. The new pretrial conference will not be a standard pretrial, but will, instead, be an elaborate, time-consuming "mini trial". This result, quite simply, is a manifest injustice to Mr. Smith, which will further exacerbate the already mounting logjam of pending cases.

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1. It should be noted that the Court of Appeals in their opinion misquoted Dr. Freston on having said the seat belts were defective and emphasized said statement by underlining the word 'defective'. This testimony did not occur and is not in the Record.

REASON FOR GRANTING THE WRIT

I. Justice Delayed:

In criminal cases this Court by decision and by rule has always insisted on the right of a person to speedy trial. This right comes from the Sixth Amendment of the United States Constitution. The reasoning and rationale for speedy trials in criminal cases is obvious, meritorious and need not be set forth herein.

The reasoning and rationale for speedy trials, and the speedy administration of justice, in civil cases is as obvious and meritorious. Civil cases, which are generally not timely investigated, must be reconstructed and the passage of time is generally the worst enemy of injured plaintiffs even in the best of cases. The difficulty in meeting the burden of proof imposed upon a plaintiff in a civil case which occurred on January 29, 1973 and which is sent back for a new trial in September of 1980 is quite apparent. The appeal in this case took over two years. If the Tenth Circuit's opinion is allowed to stand and the case goes back for a new trial it is likely that it will be almost ten years from injury to trial. This time span is clearly unconscionable, may cause plaintiff to lose his very case, and should not be permitted.

Heretofore, to our knowledge, no citizen has raised the question of a constitutional right to speedy trial in a civil case. But the Constitution of the State of Wyoming in Article 1, Section 8, states in part:

> "All Courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay". (our emphasis)

Therefore, John Smith has such a constitutional right, and the Federal Courts must give full faith and credit to this substantive right. The Federal Constitution has not preempted this right, it is a right reserved for the people and for the states. The State of Wyoming has chosen to give this right to Wyoming people involved in civil disputes. Moreover, while all states may not have guaranteed such a right to their citizens, it is a right

of such magnitude that this Court should declare the same for all citizens of all states.

The Circuit Court violated the constitutional right of the Petitioner, denied him equal protection and the delay will result in a denial of due process. If a retrial is required, it will be next to impossible for Petitioner to meet his burden of proof. This is not because Petitioner's case has no merit since the facts of this case have resulted in two Plaintiffs' verdicts. **This impossibility is due to the unnecessary and unjustified delay of the Court System itself.**

By granting the Petitioner's Writ, this Court may be heard throughout the judicial system on this important issue concerning the speedy administration of justice in civil cases. Drastic remedies for this illness have been suggested in congress. Yet, this Court is in a unique position to remedy this serious illness in its own domain. Congress may act and promulgate procedures which are unworkable and which may well cripple our system of justice. But this Court can, if it will, cure this "cancer". This case provides a look at the whole seriously ill patient. We ask the Court to take this patient, cure him, and set forth guidelines that will tend to cure the illness of delayed justice.

How do cure this illness? We are not presumptious enough to say. We don't know. The spokesmen of this Court, as well as other scholars, have voiced remedies for the backlog, for the congestion, for the inefficiency. This case provides a forum from which these remedies can become realities. Guidelines that will provide confidence and assurance in the District and Appellate Courts can flow from a decision in this case. If the Writ is granted: this Court can reassure the Trial Courts that they have discretion in pretrial matters; set forth uniform guidelines that will expedite the cases; set forth suggested time tables that trial courts can utilize to stimulate counsel into advancing their cases expediently; set forth guidelines for Appellate Courts that not only stimulate counsel but stimulate the hearing and decision making process and even expedite judicial case loads. We ask the Court to write a prescription that will cure this illness, that is not only result oriented but also that is

workable and reasonable. This case provides an opportunity for this Court to utilize its supervisory powers in a time of need.

II. Pretrial procedure should not be transformed into a system of "mini trials" that directly contribute to the delay and "log-jammed" dockets in the Federal District Courts:

A significant amount of criticism has been directed at complex pretrial procedures in Federal Courts. Central to this criticism has been the delay created by the complex procedures. The creation of "mini trials" under the guise of Rule 16 for pretrial conferences has been a major manifestation of those complex procedures. The criticism has emanated from the judiciary as well as from the bar. See, for instance, *Pretrial Conference: A critical examination of local rules adopted by federal district courts,* 64 VA L REV 467-83 (Ap. 1978); *Pretrial Orders and McCargo v.. Hendrick: effective management or unproductive formalism?,* 4 JUSTICE SYSTEM JOURNAL 245-59 (Winter 1978): *Local Pretrial Rules in Federal Courts,* JOURNAL OF SECTION OF LITIGATION, ABA, Vol. 6, No. 3, p. 34 (Spring 1980).

In the present case, the Court of Appeals eliminated the pretrial procedure that had been established by the presiding judge of the District Court. The procedure that had been established by that Court was simple and concise under Rule 16, and the procedure contributed to the fact that this Federal District has a docket that has traditionally been the most current docket in the nation. Rather than encouraging this record, the Court of Appeals has now mandated on its own a pretrial procedure that is elaborate, detailed and complex. Designations must now be so specific that a witness will not be permitted to testify unless the actual facts and statements are explicitly mentioned in the pretrial memorandum. This procedure greatly expounds the length of the memoranda as well as the length of the hearing, and it serves as a trap on appeal if a witness' precise testimony has not been detailed in the pretrial memorandum.

The "mini trial" concept has been rejected by the Courts in

the Second, Fourth, Fifth, Seventh, and Eighth Circuits for the reasons that "mini trials" are at odds with the concept of Rule 16 and at odds with the expeditious progress of cases within the federal system. *Padovani v. Bruchhausen*, 293 F. 2d 546, 548-49 (2nd Cir. 1961); *McCargo v. Hendrick*, 545 F. 2d 393 (4th Cir. 1976); *Silas v. Sears, Roebuck & Co., Inc.* 586 F. 2d 382 (5th Cir. 1978); *Identiseal corp of Wisconsin v. Positive Identification*, 560 F. 2d 298 (7th Cir. 1977); *Edgar v. Slaughter*, 548 F. 2d 770 (8th Cir. 1977).

After this Court confirmed the discretion of the trial courts in pretrial matters in *Link v. Wabash Railroad Co.*, supra, some districts began to create distinct and exceedingly complex pretrial conference procedures. Thus, dual proceedings or "mini trials" began to evolve with severe sanctions for non-compliance. In 1976 the Fourth Circuit in *McCargo*, supra, struck down the "mini trial" concept, thereby adding to the precedent established by the Second Circuit in *Padovani*, supra. The other circuits followed.

The Court in *McCargo* expressed the problems created by "mini trials" very aptly:

> "Good pretrial practice has also been described. It is always simple. Professor Moore, for example, states that ' (t)he chief purposes of the pretrial conference are. . . , to lessen surprise at trial and the risk of prejudicial error, to conclude stipulations on matters of evidence, and to promote settlements. ' 3 J. MOORE, FEDERAL PRACTICE §16.02, at 1106 (2d ed. 1974). The HANDBOOK FOR EFFECTIVE PRETRIAL PROCEDURE, adopted by the Judicial Conference of the United States in 1964, identifies the purpose of pretrial procedure as being the 'strip(ping of) each case to its essential.' The HANDBOOK states that this goal is achieved by stipulating undisputed matters, specifying issues with particularity, and formulating an efficient trial plan so as to avoid technical objections and the introduction of unnecessary evidence. 37 F.R.D. 255, 272 (1965). Local Rule 2.08 is a distortion of such purposes. Simplicity has been forgotten. The theory seems to be that if two pages are good, four must be better, and ten or thirteen or twenty-one

may prevent a trial altogether, as happened here. . . .In fact, it contemplates that the district judge himself will dictate the pretrial order. Of course, the court may seek the aid of counsel in preparing the order, . . .

Ours is an adversary system of justice. Local Rule 2.08 is inquisitorial in tone and purpose. In our system lawyers worry about the whereabouts of witnesses. The court does not. Lawyers worry about proof. The court does not – except in the rare case of collusion. Lawyers get the case ready for trial. The court does not. Local Rule 2.08 subordinates the role of the lawyer to that of the administering magistrate, reducing counsel to the role of clerical assistants who are to anticipate imaginatively what other matters ought to be embraced within an endless pretrial order."

Prior to the present case, the Tenth Circuit had decided a number of cases that indicated a respect for the trial court's discretion in pretrial matters, as well as indicating a disdain for complex and technical pretrial procedures. *Berger v. Brannan*, 197 F. 2d 241 (10th Cir. 1941); *Jones v. Union Auto Indemnity Association*, 287 F. 2d 27 (10th Cir. 1961); *Monod v. Futura, Inc.*, 415 F. 2d 1170 (10th Cir. 1969); *Case v. Abrams*, 352 F. 2d 193 (10th Cir. 1965); *Coffey v. U.S.*, 333 F. 2d 945 (10th Cir. 1964); *Globe Cereal Mills v. Scrivener*, 240 F. 2d 330 (10th Cir. 1956); *Stroud v. B-W Acceptance Corp.*, 372 F. 2d 185 (10th Cir. 1967).

When presented with the instant case, however, the Tenth Circuit overruled its earlier decisions concerning pretrial procedures and invokes the "mini trial" system as the rule of this Circuit. In so doing, the Tenth Circuit Court of Appeals has broken sharply with the developing precedent in other Circuits at a time when the judiciary and the bar alike are becoming more sensitive to the need for more efficient procedures in federal courts.

The need for this Court to exercise its supervisory powers to define the parameters of Rule 16 procedures is manifest. The elimination of "Circuit directed mini trials" will expedite the movement of cases to trial. This petition provides an appropriate and timely mechanism to achieve the needed redefi-

nition of these procedures to eliminate the conflict that presently exists in the circuit courts. Such a ruling would not only provide justice for the petitioner in this case, but it would also be a positive step in the direction of achieving a more efficient system of justice that would be less prone to delay and unnecessary "logjams". In short, a decision in this case could serve to facilitate the easy and rapid flow of cases through the federal courts.

III. Federal District Courts should be encouraged in their effort to adopt efficient pretrial procedures.

Since this Court's decision in *Link*, supra, it has been the policy within the federal system that district courts are to be afforded wide discretion in enforcing their pretrial procedures. When a district court has adopted a simple and workable pretrial procedure, that procedure should not be lightly supplanted by the Court of Appeals. In the present case, Judge Brimmer had established efficient procedures and these procedures were significant in developing a docket that stands as the most efficient and most up to date in the nation.

The interpretations of Rule 16 procedures have resulted in various guidelines that control appellate review by the Circuit Courts. These general guidelines can be summarized as follows:

1) The trial court has discretion to enforce and control the enforcement of its pretrial orders. *Link v. Wabash Railroad Co.*, supra.

2) The trial court ruling regarding whether the evidence presented conforms with the pretrial order will not be disturbed on appeal absent a clear abuse of discretion. *Myers v. Penney Packwoods Home Ownership Association*, 559 F. 2d 894 (3rd Cir. 1977).

3) Appellate Courts will not interfere with the rulings of the district court absent a clear abuse of discretion. *Ely v. Reading Company*, 424 F. 2d 758 (3rd Cir. 1970).

4) To make pretrial procedure effective appellate inter-

ference with the trial court's discretion must be kept to a minimum. *Syracuse Broadcasting Corporation v. Newhouse*, 295 F. 2d 269 (2nd Cir. 1961).

5) Pretrial statements should be interpreted liberally to save the cause of action and to avoid the burden on the dockets that is caused by a new trial. *Washington State Bowling Proprietors Association v. Pacific Line, Inc.*, 356 F. 2d 371 (10th Cir. 1966).

It is submitted that the ruling by the Tenth Circuit in the present case is at odds with every one of the above rules, and the result has been to inflict a manifest injustice upon the petitioner as well as the trial court. It is important to emphasize that in overturning the verdict in this case, the Circuit Court not only disregarded the specific findings of the trial court concerning absence of surprise and compliance with the pretrial procedure, but the Circuit Court made no attempt to make, nor did it make, a finding that the District Court had abused its discretion. Moreover, the background of this case, as earlier discussed, substantiates Judge Brimmer's finding of an absence of surprise. After six years of involvement with this particular accident, counsel for all parties have become very familiar with the issues presented. Ford Motor Company was very well prepared on the issue of causation, having listed and provided at trial medical and engineering experts to testify concerning causation. In this regard, Judge Brimmer's finding that physicians have been permitted traditionally to testify whether a particular injury was caused by a particular trauma is telling.

If this precedent-setting opinion is permitted to stand, it will deprive the United States Supreme Court of its rule making power in that it creates an intricate, unwielding maze out of the efficient procedures established by this Court in Rule 16. Further,the ruling by the Tenth Circuit removes the discretion of the district courts to formulate and enforce single and effective pretrial procedures. District courts will be straightjacketed by a complex pretrial procedure that was not intended by Rule 16, and they will be precluded from removing that jacket even if its own discretion indicates that full compliance has been made with its pretrial procedures. This opinion will

have a chilling effect on district courts who will be reluctant to exercise their discretion to prevent manifest injustice and to supervise pretrial matters for fear of being second guessed by the Circuit Courts. This opinion which is in conflict with the other circuits deprives the district courts of any stable guidelines and clearly causes a manifest injustice to petitioner Smith.

The broad discretion afforded to trial courts in pretrial matters has always been recognized, yet the ruling by the Tenth Circuit seeks to preclude the exercise of that discretion. Courts throughout the nation – including the Tenth Circuit Court of Appeals prior to this case – have given repeated recognition to this important principle:

1) The pretrial conference is not intended to serve as a substitute for trial. *Lynn v. Smith*, 281 F. 2d 501 (3rd Cir. 1960); *Syracuse Broadcasting Corporation v. Newhouse*, 295 F. 2d 269 (2nd Cir. 1961); *Berger v. Brannan*, supra, 172 F. 2d 241 (10th Cir. 1949), cert. den. 337 U.S. 941.

2) Efficient pretrial procedures can be maximized by keeping appellate interference to a minimum. *Spellacy v. Southern Pacific Company*, 428 F. 2d 619 (9th Cir. 1970); *Ely v. Reading Co.*, 424 F. 2d 758 (3rd Cir. 1970); *Cruz v. U.S. Lines Company*, 386 F. 2d 803 (2d Cir. 1967); *Syracuse Broadcasting Corporation v. Newhouse, supra, Padovani v. Bruchhausen*, 293 F. 2d 546 (2nd Cir. 1961); *National Farmers Organization Inc.v. Oliver*, 530 F. 2d 815 (8th Cir. 1976); *Davis v. Duplantis*, 448 F. 2d 918 (5th Cir. 1971); *Moore v. Sylvania Electrical Products, Inc.* 454 F. 2d 81 (3rd Cir. 1972).

3) Courts have permitted the introduction of evidence in situations which do not compare with the present case, such as where the evidence was not even disclosed during pretrial. See, e.g., *Moore v. Sylvania Electrical Products, Inc.*, 454 F. 2d 81, 84 (3rd Cir. 1972).

4) Courts have even permitted witnesses to testify who

were not listed in the pretrial memorandum. *Payne v. S. S. Nabob*, 302 F. 2d 803 (3rd Cir. 1962); *Kozar v. Chesapeake & Ohio Ry. Co.*, 320 F. Supp. 335, 374 (D.C. Mich. 1970); *U.S. v. Pirnie*, 472 F. 2d 712 (8th Cir. 1973); *Simonsen v. Parlo Plastics Company*, 551 F. 2d 469 (1st Cir. 1977).

(See also the Tenth Circuit decision that permitted a witness to testify who was not listed in the pretrial memoranda, the Court basing its decision on the technicality that an order from the pretrial conference had not been filed. *Jones v. Union Auto Indemnity Association*, 287 F. 2d 27 (10th Cir. 1961). The previous approach to pretrial matters by the Tenth Circuit was also reflected in the case of *Stroud v. B-W Acceptance Corporation*, 372 F. 2d 185 (10th Cir. 1967) where the Court upheld the Trial Court's allowance of a witness to testify even though the witness was endorsed.).

5) While pretrial orders have a binding effect, they are not pointlessly adhered to at trial. The application of preclusion is always viewed as a matter of judicial discretion. *Monod v. Futura, Inc., supra; Case v. Abrams, supra; Coffey v. U.S., supra; Globe Cereal Mills v. Scrivener, supra.*

6) In the absence of a finding of an abuse of judicial discretion, it is not error for a Court to permit the introduction of evidence or to hear witnesses not listed in accordance with the Court's order. *Wright Root Beer Co. v. Dr. Pepper Co.*, 414 F. 2d 887 (5th Cir. 1969); *Washington Hosp. Center v. Cheeks*, 394 F. 2d 964 (C.A. 1968); *Stewart v. Meyers*, 353 F. 2d 691 (7th Cir. 1965); *Coffey v. U.S., supra; Pan-American Gas. Co. v. Reed*, 240 F. 2d 336 (5th Cir. 1957); *Sedowski v. Bombadier Ltd., supra; Peter Eckrich & Sons, Inc. v. Selected Meat Company*, 512 F. 2d 1158 (7th Cir. 1975); *Delava Turbine Inc. v. West India Industries, supra; Agrashell Inc. v. Hammonds Products Company*, 479 F. 2d 269 (8th Cir.1973); *Marks & Company v. Diners Club, Inc.*, 400 F. Supp 581 (D.C. NY 1975); and *Davis v. Duplantis, supra.*

7) The pretrial order is to be liberally construed so that it covers any of the legal or factual theories that might be embraced by its language. *Century Ref. Company v. Hall*, 316 F. 2d 15 (10th Cir. 1963); *Compagnie National Air France v. Port of New York Authority*, 427 F. 2d 951 (2nd Cir. 1970); *Osborne v. Boeing Airplane Company*, 309 F. 2d 99 (9th Cir. 1962); *Rodriequez v. Ripley Industries, Inc.*, 507 F. 2d 782 (1st Cir.1974); *Reedy v. Travelers Insurance Company*, 500 F. 2d 1117 (5th Cir. 1974).

CONCLUSION

Should the Tenth Circuit be permitted, in the absence of a finding of abuse, to substitute its discretion for that of the trial court contrary to *Link v. Wabash* and in direct conflict with the other circuits? Should the Tenth Circuit be permitted to remand a products liability case, in which Petitioner was injured in January of 1973 in which two juries have found a defective product, and in which the Circuit Court had the appeal for over two years, when the Petitioner has a State constitutional right to the speedy administration of justice? Is the Circuit's mandated use of mini trials in the pretrial procedures a violation of Rule 16? Should this Court grant this Writ and by this case formulate supervisory guidelines for pre-trial matters and the speedy administration of justice.

We respectfully submit that this Writ provides this Court with the mechanism to remedy a critical problem in the Federal System that mandates the uniformity that only this Court can direct. Granting of this Writ will prevent a manifest injustice to this Petitioner.

We respectfully request that this Writ be granted.

DATED this 12th day of December, 1980.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOHN H. SMITH, Plaintiff-Appellee, v. FORD MOTOR COMPANY, Defendant-Appellant.	)	No. 78-1636

Appeal From the United States District Court
For the District of Wyoming
(D.C. No. C76-137B)

Edward P. Moriarity of Spence, Moriarity & Schuster, Jackson, Wyoming (G. L. Spence and Robert P. Schuster of Spence, Moriarity & Schuster, and John R. Hursh, Central Wyoming Law Associates, Riverton, Wyoming, with him on the brief), for Plaintiff-Appellee.

Gordon G. Greiner of Holland & Hart, Denver, Colorado (G. G. Greenlee of Murane & Bostwick, Casper, Wyoming, with him on the brief), for Defendant-Appellant.

Before BARRETT, DOYLE and SEYMOUR, Circuit Judges.

BARRETT, Circuit Judge.

The basic controversy in this case has been previously before this Court, and our opinion is reported in *Fox v. Ford Motor Company*, 575 F. 2d 774 (10th Cir. 1978). Both the prior case and the present one arose from an automobile collision which occurred on January 29, 1973. The plaintiff, John H. Smith, was riding as a front-seat passenger in a 1970 Ford, four-door Thunderbird. Driving the car in which the plaintiff was riding was Mr. Fox, who was a plaintiff in the prior case, and who obtained a judgment for a loss as a result of the death of his wife. Their wives were passengers in the back seat of this car and both were killed.

John H. Smith, plaintiff herein, filed this action on July 30, 1976. He alleged that he suffered personal injuries as a result of defective safety belts and seats; that the defective conditions were the result of negligence in the design, installation, construction, inspection and testing of the seat belts, the seat tracks, dashboard and windshield. There were claims which alleged strict liability and breach of warranty as well.

The January 29 headon collision resulted from a pickup truck crossing the center line into the plaintiffs' lane on the opposite side of the highway. The Smiths and the Foxes had been driving in an opposite direction and so the almost headon impact was a heavy one. Even though neither vehicle was moving at high speeds, the vehicular damage and the personal injuries were of great magnitude. The approximate speed of each vehicle was 25 to 45 miles per hour just before the impact.

The main action against Ford is based upon the alleged negligent design of the seats and the seat belts, together with the subsequent negligence in failing to correct some of these conditions after having discovered the defects. All of the passengers wore lap seat belts. The Messrs. Fox and Smith had shoulder belts available, but they were not using them. Smith's injuries were more severe than those of Fox. There is, of course, no contention that any defect in the vehicle itself caused the headon collision. The contention is that the injuries of Smith were greatly aggravated due to the defects in design of the lap belt and the manner in which it was anchored so that it could not protect passengers in a heavy impact.

Plaintiff Smith, whose case is before us, incurred very serious permanent internal injuries. Included were injuries to his spleen and pancreas, as well as to his intestines and face. The spleen had to be removed as a result of the injuries incurred, and subsequently a pancreatic condition developed. Smith's complaint was that he had suffered a great amount of pain and would suffer future consequences which allegedly included impairment of his eating ability, diarrhea, possible diabetes and future surgery from the pancreatitis. Also alleged was the risk of blindness, stroke, cancer, heart disease, impotency and amputation. From the removal of the spleen it was alleged that phlebitis, pneumonia, clotting, pulmonary infarctions and susceptibility to infection had occurred.

The cause was tried to a jury, and following a 10-day trial, a verdict in the amount of $800,000 was returned. Ford seeks review and reversal of the judgment based upon this verdict. Motions for judgment notwithstanding the verdict, for new trial, and remittitur were filed and denied. Various issues are raised on appeal. **However, our determination that the District Court erred in receiving the testimony of a crucial expert witness is despositive.**

I.

Ford strenuosly asserts that the District Court abused its discretion in allowing Dr. James W. Freston to testify, over objection, that Smith's internal injuries were significantly enhanced as a proximate result of the unreasonably dangerous passenger restraint system employed in the Fox vehicle. Ford contends that Smith's failure to disclose the substance of such testimony (1) violated the Court's pretrial order; (2) violated Smith's duty to provide supplemental responses to interrogatories pursuant to *Rule 26 (e)*, Fed. Rules Civ. Proc., 28 U.S.C.A.; and, (3) prejudiced Ford's ability to counter such evidence.

As noted earlier, Smith's theory of liability was tied to Ford's alleged breach of its duty to "design and construct automobiles in a reasonable and prudent manner so that failures of the parts of the automobile will not cause [enhanced personal] injuries to the occupants when a collision occurs." *Chrysler Corp. v. Todorovich*, 580 P. 2d 1123, 1129-1130 (Wyo. 1978). Proof of

liability under such a theory requires the plaintiff to establish that the defective nature of the passenger restraint system proximately caused "damage or injury...over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design." *Larsen v. General Motors Corp.*, 391 F. 2d 495, 503 (8th Cir. 1968); *Fox v. Ford Motor Co., supra.* Almost invariably, such proof entails the presentation of expert testimony. *See Randolph V. Collectramatic, Inc.*, 590 F. 2d 844 (10th Cir. 1979).

Pretrial Background

During the discovery phase of the case, Ford propounded a series of interrogatories requesting, among other things, the following information:

> 23. For each expert witness, including physicians, which you may call at the trial of this matter, state:
>
> (a) His name and address;
>
> (b) A brief description of his testimony;
>
> (c) Any opinions which he may be called upon to give;
>
> (d) The facts upon which he will base such opinions.

[R., Vol. I, p. 13].

In response, plaintiff identified Dr. Brohm, Dr. Ferris, Dr. Gullickson, Dr. Axthelm and Professor Crawford as expert witnesses, described the opinions of each and set forth the basis for those opinions. In addition, Smith responded:

> As the case develops, and detailed examination continues, further testimony may be required and the essence of same will be provided as required by the Rules of Civil Procedure.

[R., Vol. I, p. 19].

Plaintiff did indeed supplement this interrogatory with additional information about Professor Crawford, but failed at any time to mention Dr. Freston.

The first notice of plaintiff's intention to call Dr. Freston as an expert witness at trial occurred on January 24, 1978--less than two and one-half months before trial. Plaintiff's supplemental pretrial submission, filed that date, contained the following:

The Plaintiff, as of the date of the Supplemental Pretrial Submission, intends to call the following witnesses:

***

8. Dr. Freston, University Hospital, Salt Lake City, Utah, will testify as to his medical treatment of the Plaintiff, as well as to his prognosis.
[App., Vol. I, pp. 71-72].

This identification was in response to an earlier court order that "the parties may call additional witnesses...on the condition that at least five (5) days prior to the supplemental pretrial conference they furnish opposing counsel with the names and addresses of the additional witnesses, together with a brief summary of the testimony they are expected to give." [App., Vol. I, p. 61].

At the supplemental pretrial conference, held January 27, 1978, the parties were given until March 6, 1978, to designate additional witnesses expected to be called at trial. Although plaintiff earlier anticipated no need to call additional witnesses[App., Vol. I, p. 72], he subsequently designated fourteen other witnesses for use at trial. [App., Vol I, pp. 114-116]. Among these witnesses were Drs. Volk and Gainsford of Salt Lake City, Utah, "listed in the medical records of the plaintiff." [App., Vol. I, p. 114]. Ford also designated three additional witnesses. Both parties' motions to strike the testimony of certain of the recently named individuals on the grounds of inadequate time to conduct discovery prior to trial were denied by the Court on March 15, 1978. [App., Vol. I, p. 136]. Ford did not move to strike the testimony of Drs. Volk and Gainsford.

Ford earlier deposed several other doctors designated by Smith as experts likely to be called at trial--including Drs. Brohm and Gullickson. Both of these physicians were designated in plaintiff's supplemental pretrial submission as experts who would testify about medical care given to the plaintiff, as well as his prognosis. Each of these witnesses was specifically asked in deposition whether he had any opinion regarding

the relationship of plaintiff's injuries and the alleged deficient design or manufacture of the automobile. Each was also asked whether he had made a study of the seat belt syndrome or read any literature in the area. Each replied in the negative to these questions. [Gullickson dep., R., Vol. XVIII, pp. 21-22; Brohm dep., R., Vol. XXI, pp. 12-15]. Dr.Freston was not deposed.

Trial Background

On March 29, 1978, plaintiff called his first witness, Dr. James W. Freston. Freston testified that he was currently employed as a Professor of Medicine and Clinical Pharmacology, and as Chairman of the Department of Gastroenterology at the University of Utah. Dr. Freston holds both an M.D. and Ph. D. in medicine, and has compiled a list of impressive credentials, including the authorship of some sixty-two articles in his field. At one point in his testimony, he described himself as a "specialist's specialist" in the area of gastroenterology.

Early in his testimony, Dr. Freston reviewed, in detail, the history of plaintiff's injuries and subsequent medical treatment using various visual aids. From this, the doctor moved to specifically deal with the injuries to Smith's pancreas, which he identified as resulting from the automobile accident, [App., Vol. I, pp. 245, 260-261] as well as his prognosis. No defense objection was interposed as to Dr. Freston's opinion that the injuries complained of arose out of the collision between the two vehicles. Objections were interposed, however, when plaintiff's counsel attempted to elicit testimony establishing the existence of conditions consistent with seat belt injuries.

A hearing on the objections was held in chambers. Counsel for Ford claimed prejudicial suprise at Smith's attempt to elicit testimony establishing proximate causation between the lap belts employed and nature of the injuries—an area Ford claimed was clearly outside the scope of plaintiff's description of Dr. Freston's proposed testimony.[1] The Court ruled

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1. The colloquy itself is enlightening and we feel sharpens the issues involved. Its length, however, requires that we frame it in the form of an appendix to this opinion.

that the testimony sought was proper on three grounds: (1) that the custom of Wyoming practice has been to describe in extremely narrow terms the substance of proposed witnesses' testimony proir to trial; (2) that the claim of surprise was unjustified because "we have gone into this question as to the causal condition with doctors always." [App., Vol. II, p. 267]; and, (3) that Ford's failure to object to Dr. Freston's testimony that the injury resulted from the accident waived its right to object as to relationship between those injuries and the lap belts employed.

The continuation of plaintiff's direct examination of Dr. Freston crystalized the connection between Smith's intra-abdominal injuries and the passenger restraint system. Dr. Freston stated that his examination of over one hundred intra-abdominal injuries which occurred during traffic accidents, some showing physical evidence of seat-belt injury, formed the basis for his opinion that bruises or injury high in the abdomen, such as to the pancreas, result from seat belts which fail to properly function. Where bruises are localized in the hip area, this evidences seat belts which are non-defective. With specific reference to Smith's injuries, Dr. Freston testified:

Q [Mr. Spence] All right. Now, when you find an injury as high as the pancreas, what does that mean to you?

A [Dr. Freston] Well, something unusual has happened; something out of the ordinary.

Q With respect to the functioning of the seat belt?

A Yes.

***

Q What do you find in that regard?

A I find that if the seat belt isn't functioning properly and is over the abdomen rather than over the hips, the injuries tend to occur higher. And we start to see rupture of the spleen and we start to see injuries to the pancreas.

Q Do you have an opinion based upon reasonable medical probability as to the causal – as to what caused the injuries [to the] spleen and to the pancreas in the case at hand?

MR. GREENLEE: [objection]

THE COURT: [overruled]

A Yes, I have an opinion.

Q (By Mr. Spence) Would you state to the jury what your opinion is?

A Yes. **My opinion is that the probability is overwhelming that the injury to the pancreas resulted from the automobile accident.**

And specifically, the evidence is good that the seat belt was involved in that injury.

And if I may –I'm sensitive to Mr. Greenlee's objection – we are quite capable of diagnosing events today that started five years ago. That's a matter of routine in medicine.

Q Thank you very much. Now, I want to ask you another question. There has been a contention made in this case that the injuries in this case were a result of upward pressure on [t]he organs in the accident, which upward pressure of the organs internally for those organs on other organs and caused the injury to the spleen and to the pancreas.

Do you have an opinion based upon reasonable medical certainty as to that contention?

A Yes.

Q Would you tell the jury what it is and the basis for your opinion?

opinion or conclusion must permit reasonably accurate conclusions as distinquished from mere guess or conjecture. 20 Am.Jur., Evidence, §§ 788, et seq.

The inherent problems in forcing the propounding party to supply such "material" facts often led to awkward results. For example, in *United States v. Sessin, supra,* at p. 669 the following issue arose:

> A hypothetical question was propounded to a physician, upon the basis of which the witness was asked for his opinion as to the bodily ailments which afflicted plaintiff on January 1, 1919, as to the prognosis thereof, and as to whether one so afflicted was physically incapacitated to work. **The question took half an hour to propound; it was necessarily long because plaintiff's medical history was long.** It was objected that a few of the multitudinous statements of the hypothesis lacked meticulous accuracy. Two supposedly defective statements are pressed as grounds for reversal. One is that the question assumed that the wound had been cleaned out once a year. The proof was that there were twenty-three such operations over a period of seventeen years, and that plaintiff did not remember the date of the last operation although it was a good many years after he left the hospital. The other defect is that the hypothesis referred to an abscess in the abdomen as tubercular. That there was an abdominal abscess is not disputed; the proof showed a tuberculosis of the lung and leg bone at the time. No other cause for the abdominal abscess being shown, it is not an unfair inference that it was tubercular, occurring as it did between two foci of tubercular infection. [Emphasis supplied].

Although we there affirmed the trial court's decision admitting the opinion evidence, the practical difficulties are illustrated.

At the same time, the heavy burden placed on the examiner to articulate foundational facts under the hypothetical question rule, often resulted in a denial of pretrial discovery to the cross-examiner concerning the expert and his proposed testimony. Prior to the enactment of the 1970 amendments to the Federal Rules of Civil Procedure, 28 U.S.C.A., no provision was made in

testimony, however, dealt exclusively with the engineering and physics aspects of the collision forces. It did not relate those movements to medical injury.[5]

Ford's expert witness, Donald F. Hueke—a professor at the University of Michigan Medical School, and a recognized authority in the field of automotive injury—refuted in large part Dr. Freston's causation testimony, specifically addressing Dr. Freston's interpretation of the *Garrett and Braunstein* study.

A.
The Interface Between Pretrial Discovery And the Presentation of Expert Testimony

Traditionally, the presentation of expert testimony involving opinion evidence required the establishment of certain foundational facts prior to the expression of the opinion. *See, J. Wigmore, Evidence § 672, at pp. 792–793 (3rd Ed. 1940).* The use of hypothetical questions provided the normal vehicle for the elicitation of such evidence. Although this Court treated the foundational requirements for opinion evidence liberally, *United States v. Sessin*, 84 F.2d 667 (10th Cir. 1936), *New York Live Ins. Co. v. Doerksen*, 75 F.2d 96 (10th Cir. 1935), other courts strictly enforced the requirements. *Harris v. Smith*, 372 F.2d 806 (8th Cir. 1967); *Kale v. Douthitt*, 274 F.2d 476 (4th Cir. 1960). In *Kale v. Douthitt, supra*, at p. 482, the Court stated:

> Generally, a hypothetical question must assume all facts disclosed by the evidence material to the theory of the case as viewed from the side propounding the question. A question which assumes any material fact not supported by the evidence is inadmissible. A question which omits any material fact essential to the formation of a rational opinion is likewise incompetent. The facts upon which the expert bases his

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5. This testimony was presented primarily through Professor Richard H. Crawford, who specifically acknowledged that he was not qualified to discuss the relationship between the load forces and the injury from a medical standpoint.

MR. GREENLEE: [objection]

THE COURT: [overruled]

A Well, my opinion is that it's highly improbable.

[App., Vol. II, pp. 272-276]. [Emphasis supplied].

This testimony was presented in a graphic, persuasive manner. Following the statement of his opinion, Dr. Freston punctuated his point with empirical studies[2] and the use of a mannequin showing the various intra-abdominal organs.

At the completion of Dr. Freston's direct examination, counsel for Ford was granted a ten minute recess to prepare for his cross-examination of the witness.[3] Ford did briefly cross-examine Dr. Freston concerning the seat belt syndrome.

After Dr. Freston was excused as a witness, Ford requested plaintiff's counsel to provide him with a copy of *Garrett and Braunstein*. Following plaintiff's refusal, the District Court ordered production. [App., Vol. II, pp. 316-321].[4]

Smith also produced evidence showing the motion and stress areas of the human body in relation to passenger restraint systems such as that employed here at the time of collision. Such

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2. *Garrett and Braunstein, The Seat Belt Syndrome*, delivered before the Twenty-First Annual Session of the American Association for the Surgery of Trauma, Chicago, Illinois, September 28–30, 1961. [Hereinafter cited as *Garrett and Braunstein]*. A reprint of the study is available through the Highway Safety Research Institute at the University of Michigan, Ann Arbor, Michigan.

3. The recess was granted at 4:43 p.m. and trial resumed at 4:54 p.m. Dr. Freston was scheduled to leave Casper, Wyoming, at 9:15 a.m. the next morning.

4 Ford asserts that "[d]espite the Court order, plaintiff's counsel never produced the article." [Brief of Appellant at p. 35, n. 2]. Inasmuch as Smith has not expressly conceded this statement, we cannot consider it in deciding whether prejudicial error occurred. *See Braden v. University of Pittsburg*, 477 F.2d 1, 6 (3d Cir. 1973).

the Federal Rules with respect to the discovery of experts or the nature of their information. Judicial treatment of the issues surrounding the discovery of such information varied, with the result that most pre-1970 decisions denied discovery in its entirety or limited it to extremely narrow areas. *See, Long, Discovery and Experts Under the Federal Rules of Civil Procedure,* 38 F.R.D. 111, at p. 112 (1965); *Winner, Procedural Methods to Attain Discovery,* 28 F.R.D. 97 (1960). Some of the earlier cases treated experts as agents of the attorney under the attorney-client privilege and denied discovery on that basis. *See, e.g., Schuyler v. United Airlines, Inc.,* 10 F.R.D. 111 (M.D. Pa. 1950); *Cold Metal Process Co. v. Aluminum Co.,* 7 F.R.D. 684 (D. Mass. 1947). A second approach, patterned after the qualified work product privilege developed in *Hickman v. Taylor,* 329 U.S. 495 (1947), immunized discovery unless the opponent could show a substantial, particularized need for the information. *See, Carpenter–Trant Drilling Co. v. Magnolia Petroleum Corp.,* 23 F.R.D. 257 (D. Neb 1959). Other courts refused discovery simply on the basis of the expert's status. *See, e.g., American Oil Co. v. Pennsylvania Petroleum Products Co.,* 23 F.R.D. 680 (D.R.I. 1959). Still other opinions developed a doctrine of "unfairness" holding discovery unavailable if the result was that one party would be taking unreasonable advantage of an opponent's diligence or financial resources in obtaining expert testimony. *See, e.g., United States v. 23.76 Acres of Land,* 32 F.R.D. 593 (D. Md. 1963).

The drafters of the 1970 amendments to the Federal Rules of Civil procedure sought to resolve this inharmonious state of affairs by providing a uniform, orderly scheme of discovery. That scheme of discovery is now embodied in Fed. Rules Civ. Proc., rule 26, 28 U.S.C.A. [hereinafter cited as rule 26]. Rule 26 liberalized discovery, adopting the doctrine of "unfairness" as its guide. Under rule 26(4 (A) (i),

> (A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and **to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds**

for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b) (4) (C) of this rule, concerning fees and expenses as the court may deem appropriate.

[Emphasis supplied].

The Advisory Committee on Civil Rules, which promulgated the original draft, published an accompanying text explaining the intent of the drafters and the basis for the new provisions:

> **In cases of this character [involving expert testimony], a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of and expert witness requires advance preparation.** The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, Some Practical Problems in Proof of Economic, Scientific, and Technical Facts, 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is "lengthy – and often fruitless – cross-examination during trial," and recommends pretrial exchange of such material. Calif. Law Rev. Comm'n, Discovery in Eminent Domain Proceedings 707–710 (Jan. 1963). **Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.**
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> Advisory Committee Notes, rule 26, Fed. Rules Civ. Proc., 28 U.S.C.A. [Emphasis supplied].

This liberalization in the discovery area also resulted in liberalization in other areas. The increased availability of discovery concerning expert witnesses and the facts upon which they based their opinions, prompted reexamination of the hypo-

thetical question requirement and other traditional foundational basis that were necessary prior to the introduction of opinion evidence. Criticism surrounding these areas mounted:

> The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 426-427 (1952).
>
> Advisory Committee Notes, rule 705, Fed. Rules Evid., 28 U.S.C.A.

* * *

> [I]t is a failure in practice and an obstruction to the administration of justice. If we require that it recite all the relevant facts, it becomes intolerably wordy. If we allow, as most courts do, the interrogating counsel to select such of the material facts as he sees fit, we tempt him to shape a one-sided hypothesis. [Footnotes omitted]. C. McCormick, Evidence § 16 at p. 36 (2d ed. E. Cleary 1972).

It was in response to this criticism that Federal Rules of Evidence 703 and 705, 28 U.S.C.A. were enacted. Rule 705, eliminating the need for hypothetical questions, allows an expert witness to "testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise." Cross-examination may, however, be used to ferret out such underlying facts. Rule 703 specifies that the underlying facts or data need not be admissible in evidence if "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *See also: Bryan v. John Bean Division of FMC Corp.*, 566 F. 2d 541 (5th Cir. 1978). The combined effect of these new rules is to "place the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination. As stated in the Advisory Committee Note to Rule 705, and highlighted by the elimination of the foundation often provided by the hypothetical question, "advance knowledge through pretrial discovery of an expert wit-

ness's basis for his opinion is essential for effective cross-examination." *Graham, Discovery of Experts Under Rule 26 (b) (4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. Ill.L.F. 895, 897 [hereinafter cited as *Graham, Part One*].

The Advisory Committee on the proposed Federal Rules of Evidence, recognizing the need for such pretrial disclosure, considered the provisions of rule 26, Fed. Rules Civ. Proc., 28 U.S. C.A. sufficient:

> If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. **The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b) (4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts.** Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455 (1962).
>
> Advisory Committee Notes, rule 705, Fed. Rules Evid., 28 U.S.C.A. [Emphasis supplied].

Professor Friedenthal has also recognized the critical nature of such pretrial discovery:

> **It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretiral discovery, particularly when expert witnesses are involved.** Unlike two eye-witnesses who disagree, two experts who disagree are not necessarily basing their testimony on their views of the same objective features. Instead they may rely on entirely separate data, since the theoretical bases underlying their respective approaches may differ radically. **Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the**

data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony. He may need advice of his own experts to do so and indeed, in certain cases, his experts might require time to make further inspections and analyses of their own.

The need for pretrial discovery regarding expert witnesses is further evidenced by the ever-increasing dissatisfaction with the honesty and reliability of expert testimony. . . .

Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455, 485 (1962) [Footnote omitted]. [Emphasis supplied].

This liberalization is further illustrated by the provisions of rule 26(e), Fed. Rules Civ. Proc., 28 U.S.C.A. Under rule 26(e) a party is under a duty to seasonably supplement his response only in three situations, one of which includes information concerning "the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony."

The failure of a party to comply with discovery requests under rule 26 has led to findings of prejudice resulting in the exclusion of the proffered evidence. *Coleco Industries, Inc. v. Berman*, 567 F. 2d 569 (3d Cir. 1977), *cert. denied*, 439 U.S. 830 (1978); *Tabatchnick v. G. D. Searle & Co.*, 67 F.R.D. 49 (D.N.J. 1975). Similiarly, although district courts enjoy wide discretion in handling discovery and pretrial matters, *Phil Crowley Steel Corp. v. Macomber, Inc.*, 601 F. 2d 342 (8th Cir. 1979), reversible error has been found in allowing testimony without such discovery where there has been a "gross abuse of discretion resulting in fundamental unfairness in the trial of the case." *Voegeli v. Lewis*, 568 F. 2d 89, 96 (8th Cir. 1977); *Shelak v. White Motor Co.*, 581 F. 2d 1155 (5th Cir. 1978); *Weiss v. Chrysler Motors Corp.*, 515 F. 2d 449 (2d Cir. 1975).

B.

The Pretrial Order

We have previously observed that Smith failed to provide any

information, in the form of interrogaroty responses, about Dr. Freston or his proposed testimony as required by rule 26(e), Fed. Rules Civ. Proc., 28 U.S.C.A. This duty to provide responses concerning expert witnesses continues through trial. *Weiss v. Chrysler Motors Corporation, supra.* If we were faced solely with the plaintiff's failure to provide such information, we would be compelled to reverse the District Court's admission of such evidence. *Weiss v. Chrysler Motors Corporation, supra.*

Smith contends, however, that his duty to supplement was fulfilled by the description of Dr. Freston's proposed testimony provided in his supplemental pretrial submission. Smith asserts that this, combined with the alleged Wyoming custom and practice of allowing treating physicians to testify concerning causation of injuries militates against any finding of prejudice to Ford. Any surprise which may have occurred, argues Smith, was avoidable, had Ford simply taken the deposition of Dr. Freston.

Rule 16, Fed. Rules Civ. Proc., 28 U.S.C.A., authorizes the district courts to hold pretrial conferences designed to aid in the disposition of cases, and enter orders subsequent thereto which "control . . . the subsequent course of the action, unless modified at trial to prevent manifest injustice." The office [of the pretrial order] as a procedural tool [is] to insure the economical and efficient trial of every case on its merits without **chance or surprise.**" [Emphasis supplied]. *Case v. Abrams,* 352 F.2d 193, 195 (10th Cir. 1965). It "measures the dimensions of the lawsuit, both in the trial court and on appeal." *American Home Assur. Co. v. Cessna Aircraft Co.,* 551 F.2d 804, 806 (10th Cir. 1977), *quoting, Hodgson v. Humphries,* 454 F.2d 1279, 1281 (10th Cir. 1972). The "amendment of a pretrial order formulating issues [or designating witnesses and their proposed testimony] will be permitted during trial **only if necessary to prevent manifest injustice.**" [Emphasis supplied]. *Keen v. Detroit Diesel Allison,* 569 F.2d 547, 554 (10th Cir. 1978). The burden of establishing such manifest injustice falls squarely on the moving party. *Seneca Nursing Home v. Secretary,* 604 F.2d 1309 (10th Cir. 1979). When there exists a properly drawn, detailed pretrial order, a trial court's determination that certain facts or issues must [or should not] be

excluded from trial on the basis of a pretrial order may be reversed only if there is an abuse of discretion. *See James v. Newspaper Agency Corp.*, 591 F2d 579, 583 (10th Cir. 1979) (pretrial order specifying the witnesses to be called may be used to bar the calling of unlisted witnesses)." *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 817-818 (10th Cir. 1979).

Pursuant to rule 83, Fed. Rules Civ. Proc., 28 U.S.C.A., the District Court of Wyoming, as well as many other district courts, has adopted rules implementing the pretrial conference procedure broadly covered by rule 16, Fed. Rules Civ. Proc., 28 U.S.C.A. Rule 8, Rules of the United States District Court for the District of Wyoming [hereinafter cited as local rules], deals exclusively with pretrial procedure. Rule 8(a) of the local rules deals with "pre-trial scheduling conferences" and provides that the parties shall:

> (2) Exchange a list of all witnesses to be called at the trial, together with a brief summary of their proposed testimony. No testimony shall be received at the trial unless it be consonant with such summary and from a witness so designated, except for purposes of rebuttal or by order of the court upon the showing of good cause why the name of the witness and the summary of his testimony was not disclosed at said pre-trial conference. **Generalized summaries are not acceptable.** Additional witnesses and summaries of testimony shall be submitted by each party to the opposing party as their names and addresses are ascertained, and at the final pre-trial conference. [Emphasis supplied].

Rule 8(e) (1) also requires the parties, in connection with the final pretrial conference, to submit a memorandum with a "list of the names and addresses of the witnesses whom the parties intend to call to testify at the trial, together with a brief summary of the testimony intended to be elicited from each witness in the trial . . ." The language of Rule 8(e) (3) spells out the sanctions for counsel's failure to comply with the rule: "Except for impeachment or rebuttal purposes and absent good cause shown, no . . . witness [shall] be permitted to testify unless his name and address appear on the witness list, together with a summary of his testimony as required by this order."

Rule 8 also advises counsel who draft pretrial orders to follow Appendix D to the Rules. Appendix D is a form of pretrial order which includes the following pertinent language:

> This pre-trial order has been formulated after conference at which counsel for the respective parties have appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing by the Court. Hereafter, this order will control the course of the trial and may not be amended except by consent of the parties and the Court, or by order of the Court to prevent manifest injustice. . . .[6]

Such local rules of practice, as adopted by the district court, "have the force and effect of law, and are binding upon the parties and the court which promulgated them until they are changed in appropriate manner." *Woods Construction Co. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888, 890 (10th Cir. 1964). Considerable deference is accorded to the district courts' interpretation and application of their own rules of practice and procedure. *Martinez v. Thrifty Drug and Discount Co.*, 593 F.2d 992 (10th Cir. 1978); *Lance, Inc. v. Dewco Services, Inc.*, 422 F.2d 778 (9th Cir. 1970). Where, however, we are "convinced that the district court has misconstrued its own rules", reversal may be warranted. Wright and Miller, *Federal Practice and Procedure*, Civil § 3153. *See also, Golgrove v. Battin*, 413 U.S. 149, 161 n. 18 (1973).

A comparison of the description of Dr. Freston's testimony in plaintiff's pretrial memorandum, with Dr. Huelke's testimony in Ford's pretrial memorandum, is instructive. Ford described its witnesses as follows on July 21, 1977:

> Defendant does not anticipate that it will call witnesses other than a Ford engineer (either Everett Kennedy and/or Louis Tubben) and Dr. Donald Huelke. . . . Dr. Huelke is expected to testify to anticipated injuries to be expected from an accident of the type in question and compare the

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6. This language does not appear in the final pretrial order entered in this case.

same to the injuries in fact sustained by the plaintiff. In connection therewith, Dr. Huelke may be asked to testify as to the speed of the vehicles involved, the force of the crash, the movement of the body of the plaintiff during the crash, and the like. Ford is advised that plaintiff intends to call Mr. Richard Crawford of Ponderosa Associates, and depending upon the nature of his testimony may call an accident reconstruction expert.

[App., Vol. I, at p. 22].

Despite the rather specific statement that Dr. Huelke would testify as to the relationship between the accident and plaintiff's injuries, plaintiff described his last four witnesses on January 24, 1978, as follows:

5. Dr. William Brohm, Riverton, Wyoming, will testify as to the medical care given to the Plaintiff and as to his current condition, as well as his prognosis. (This witness has been deposed.)

6. Dr. Donald Gullickson, Lander, Wyoming, will testify as to subsequent medical care rendered to the Plaintiff, as well as to his prognosis.

7. Professor Richard Crawford, Louisville, Colorado, will testify as to the design defects and failures of the right seat and the right seat compartment of the vehicle in question.

8. Dr. Freston, University Hospital, Salt Lake City Utah, will testify as to his medical treatment of the Plaintiff, as well as to his prognosis.

[App., Vol. I, at p. 72].

There is no question, in our view, that the description of Dr. Freston's testimony in the supplemental pretrial submission, later incorporated in the final pretrial order [R., Vol. I, p. 112], related solely to plaintiff's injuries and prognosis **and not to** the causal relationship between those injuries and defective lap belts.

In *Meyers v. Pennypack Woods Home Ownership Ass'n.*, 559 F.2d 894, 904-905 (3rd Cir. 1977), the court enunciated a series of factors which should be considered in determining whether a district court has abused its discretion in excluding, or in our case allowing, testimony not specified in the pretrial order: "(1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in court, and (4) bad faith or willfulness in failing to comply with the court's order." We address each of these factors separately.

1. Prejudice or Surprise in Fact.

In our opinion, it is noteworthy that Dr. Freston's testimony is described almost identically to that of Dr. Gullickson and Dr. Brohm. Each of these latter witnesses was deposed by Ford and each was specifically asked whether he had any opinion regarding the relationship of plaintiff's injuries and the alleged deficient design or manufacture of the automobile. Each was also asked whether he had made a study of the seat belt syndrome or read any literature in the area. Each replied in the negative to these questions. [Gullickson dep., R., Vol. XVIII, at pp. 21-22; Brohm dep., R., Vol XXI, at pp. 12-15]. Ford knew these doctors were experts only in their fields of medicine. Thus, the addition of Dr. Freston to the list of witnesses, with the same general description of his testimony, could only have misled Ford into believing that his testimony would relate solely to plaintiff's injuries and not to their relationship to a defective seat belt. Assuming that the pre-trial order was not designed to be misleading, the fact remains that such was its effect,[7] and that it prejudiced Ford in the preparation of its defense. *See Ante* at pp. 19-20.

Our view is not altered by Smith's contention that Wyoming

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7. Perhaps this explains why Ford excluded Drs. Volk and Gainsford from their motion to strike recently named witnesses made on the basis of inadequate time for discovery prior to trial.

custom and practice routinely allows treating physicians to testify as to the causation of injuries. We discern no major variance between Wyoming practice and this Court's decisions concerning the admissibility of evidence not properly disclosed to the opposing party either in pretrial proceedings or in response to properly framed discovery requests. *See Western Fire Insurance Co. v. Tim Force Tin Shop, Inc.*, 599 P.2d 540 (Wyo. 1979); *Crysler Corp. v. Todorovich, supra; Ford Motor Co. v. Kuhbacher*, 518 P.2d 1255 (Wyo. 1974.) In any event, the custom and practice in Wyoming is irrelevant. The Federal Rules of Civil Procedure control this diversity action even where there exists a conflict. *Hanna v. Plumer*, 380 U.S. 460 (1965). *See also, Walker v. Armco Steel Corp.*, ___ U.S. ___, 48 U.S.L.W. 4625 (June 2, 1980). These rules, of course, were designed to make pretrial and discovery uniform across the country and to prevent "trial by ambush".

Parallel arguments that such custom and practice obviates a finding of surprise and therefore prejudice are also unpersuasive. First, we find nothing in the record countering Ford's claim of surprise and prejudice. Second, Ford was entitled to rely on the summary of testimony provided in the supplemental pretrial submission. The fact that Wyoming practice imputes such constructive knowledge, if indeed such is the practice, is not sufficient.

> Even if plaintiff [or defendant in this case] had reason to believe that such testimony would be presented . . ., which is at best sharply disputed, that would not justify the failure . . . to respond truthfully and completely to a properly framed interragatory. "It is no objection to interrogatories . . . that the information sought is within the knowledge of the interrogating party."Bowles v. Safeway Safeway Stores, 4 F.R.D. 469, 470 (W.D.Mo. 1945); Grand Opera Co. v. Twentieth Century-Fox Film Corp., 21 F.R.D. 39, 40 (E.D.I11. 1957). "A distinction should not be drawn between facts with or without the knowledge of the examining party." 4 Moore's Federal Practice para. 26.59 at 26-219 (2d Ed. 1974).

Consequently, to characterize the issue here as being determined by a lack of "surprise" distorts the essential problem.

The policy which prompted amendment to Rule 26(b) (4) of the Federal Rules of Civil Procedure to allow more liberal discovery of potential expert testimony was not merely for convenience of the court and the parties, **but was intended to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact.** "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Hickman v. Taylor, 329 U.S. 495, 507, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947). See generally F.R. Civ. P. 26 (b) (4), Advisory Committee Notes to 1970 Amendments.

In this case the expert testimony was crucial. As Judge Bartels has well put it: "Realistically speaking, the resolution of the entire case depends upon [medical] and expert testimony and opinion. The necessities of such a case transcend the usual limitations which may otherwise be imposed upon discovery proceedings. "United States v. Nysco Laboratories, Inc., 26 F.R.D. 159, 162 (E.D.N.Y. 1960).

Weiss v. Chrysler Motors Corp., supra, at pp. 456-457. [Emphasis supplied].

See also, Coleco Industries, Inc. v. Berman, supra, (evidence of accounting study not disclosed to opposing party in pretrial properly excluded); *Voegeli v. Lewis, supra,* (expert witness' change of opinion was not admissible where it was not disclosed in advance of trial); *Tabatchnick v. G. D. Searle, supra,* (testimony of proposed new expert excluded where opponent was unfairly prejudiced).

The critical nature of Dr. Freston's testimony convinces us that Ford was prejudiced in the presentation of its case. Dr. Freston not only testified that plaintiff's injuries were caused by the seat belts; he also testified that in his opinion, based on the article he had read, the injuries were caused by a **defective** seat belt. [App., Vol. II, at pp. 271-274]. A review of the article on which Dr. Freston based his opinion [Appellee's br., App. I], makes it abundantly plain that no inference about injuries from defective seat belts, as opposed to properly functioning seat belts, can be drawn because the study did not have

that type of information unless the belt actually broke or was torn by the force of the accident, which did not occur here. This is in contrast to Dr. Freston's testimony that the study examined only users of **properly functioning seat belts** and that based on data derived therefrom, the odds of pancreatic injury are only "about one in a thousand". [App., Vol. II, pp. 311-312]. Thus, Dr. Freston left the impression with the jury that Smith's seat belt was not functioning properly.

If Ford had been apprised in advance of Dr. Freston's testimony, it could have taken his deposition, discovered the article, and been well prepared at trial to cross-examine him about his conclusions.

2. Ability to Cure.

The challenged testimony provided crucial, non-cumulative evidence on the question of whether a **defective** seat belt aggravated or enhanced the plaintiff's injuries. This, of course, supplied the proof of a key element of Smith's theory of recovery. *Larsen v. General Motors Corp., supra; Fox v. Ford Motor Co., supra.* Without it Ford would possibly have been entitled to a directed verdict. The evidence was elicited from the first witness to appear before the jury—magnifying its impact. Dr. Freston was scheduled for examination only on the day he appeared. Counsel for Smith completed his direct examination at 4:43 p.m. Ford requested and was allowed only eleven minutes to prepare for cross-examination. The *Garrett and Braunstein* article was not available for his use prior to cross-examination.

We have previously observed that the Federal Rules of Evidence contemplate that the "full burden of exploration of the facts and assumptions underlying the testimony of an expert witness [falls] squarely on the shoulders of opposing counsel's cross-examination." *Graham, Part One* at p. 897. "Before an attorney can even hope to deal on cross-examination with unfavorable expert opinion he must have some idea of the basis of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony." *Fridenthal,* at p. 486. Finally, proper impeachment or rebuttal may have required advance

knowledge so that Ford's own experts could have been consulted.[8]

Dr. Freston's scheduled departure the following day combined with the challenged testimony's revelation in the midst of trial significantly impaired Ford's ability to cure the prejudice. This was magnified by Dr. Freston's use of an empirical study not disclosed in advance of trial. Ford, of course, could have asked for a continuance in which to prepare, but given Dr. Freston's appointment the following day in Detroit and the nature of the testimony, adjournment may well have constituted a significant disruption in the trial of the case.[9]

For these reasons, we hold that Ford's ability to cure the prejudice was significantly impaired.

3. Disruption of the Trial Process.

Dr. Freston's testimony was revealed in the midst of trial. An adjournment for depositions, when considered in light of the subject matter of the testimony and Dr. Freston's other scheduled appointments, would have resulted in a significant disruption of trial. Proper rebuttal and impeachment undoubtedly would have required the consultation of other experts and, perhaps, the enlistment of new personnel or empirical data. A short continuance, such as that allowed, while not disruptive, was inadequate. The crucial nature of the testimony

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8. Dr. Huelke did address Dr. Freston's interpretation of *Garrett and Braunstein.* We believe however that such rebuttal did not ameliorate the prejudice presented as effectively as direct impeachment through cross-examination could have.

9. We reject any suggestion that prejudice did not occur or that it could have been cured on the grounds that "even if [defendant's] counsel [was] surprised by who gave the testimony, he should not have been surprised by its substance." *DeMarines v. KLM Royal Dutch Airlines,* 580 F. 2d 1193, 1202 (3d Cir. 1978). It simply was not the responsibility of Ford to second guess Smith's witnesses' descriptions in his supplemental pretrial submission. On this basis, and the similarity between the description of Dr. Freston's testimony and other witnesses already deposed, we cannot hold that Ford had a duty to "police" or "double-check" Smith's pretrial witnesses' description, on which Ford had every right to rely.

required more. *See, Coleco Industries, Inc. v. Berman, supra,* at 576-577 n. 14; *Voegeli v. Lewis, supra.*

4. Bad Faith or Willfulness

Although there was an allegation of bad faith and willfulness imputed to counsel for Smith, [App. A, p. 4], we cannot consider it inasmuch as the trial court did not make findings in this regard. *See, Ager v. Jane C. Stormont Hospital,* ___F. 2d ___ , (10th Cir. No. 79-2228 June 2, 1980). Furthermore, we do not deem remand for consideration of this point necessary. As stated in *Coleco Industries, Inc. v. Berman, supra,* at pp. 576-577 n. 14 "Here, as in *Meyers [Meyers v. Pennypack Woods Home Ownership Ass'n., supra],* there was no explicit finding of willfulness or bad faith. Nonetheless, unlike *Meyers,* no explanation was proffered for the failure to inform defense counsel of the [nature of the challenged testimony] prior to trial."

Despite our analysis, we seriously question whether bad faith or willfulness has an application to this issue. While it may prove aggravated circumstances, this would not necessarily create greater prejudical impact than a negligent act not in conformance with pretrial procedure. The issue, on appeal, must be analyzed from the point of view of the prejudiced party, not vice versa.

C.
Conslusion

Balancing these factors against the wide discretion accorded the district court in both the discovery and pretrial area, we hold that Ford suffered such prejudice as requires the case to be reversed and remanded for new trial.

REVERSED AND REMANDED.

APPENDIX A

THE COURT:
What is your objection, Mr. Greenlee?

MR. GREENLEE:
Your Honor, it seems that Gerry never fails to come up with a surprise, and he has done it again.

Dr. Freston first saw Mr. Smith in January of this year. He was first listed in the Supplemental Pretrial Memorandum of the plaintiff's. In that Supplemental Pretrial Memorandum, and in this list of witnesses, they tell me in January, less than two months to the trial, Dr. Freston, University Hospital, Salt Lake City, Utah, will testify as to his medical treatment of the plaintiff, to which I have no objection, as well as to his prognosis, to which I have no objection.

Now, they are now inquiring into the causes behind his injury, and they are doing it in such a way that the witness is going to say, "Yes, I have made a study of seat-belt injuries and these injuries are inconsistent with, " or "consistent with" – I'm not sure what he's going to say because they haven't defined –

THE COURT:
Did you take a discovery deposition?

MR. GREENLEE:
No, sir, there wasn't time. You know, we are a month and a half away from trial, they tell me all he's going to testify to is how he has treated the plaintiff and how he is going to treat him in the future.

That, you know, we admit Mr. Smith was injured. There is no question about that. I don't have any problem and you haven't heard one objection from me on this witness until this point in time. I certainly would have –

THE COURT:

I think you admitted he was injured in the accident, didn't you?

MR. GREENLEE:

Yes. Yes, he was. But now they are trying to pinpoint, you see, those injuries. Now that's unfair.

THE COURT:

Do you contend that pancreatitis occurred in some other region?

MR. GREENLEE:

The pancreatitis occurred because the various organs in the abdominal cavity were injured when Smith was violently thrown forward, the the inertial forces created by that accident caused those organs to rip and tear loose and to bang into each other in the abdominal wall and whatnot.

They were not caused, we contend, by direct application of force from the seat belt, which is where the plaintiff wants to go with this witness.

THE COURT:

What is the basis of your objection, Greg? Is it because you are claiming the doctor is speculating?

MR. GREENLEE:

Well, that's one. The first objection is, their listing of this doctor had nothing to do with what they are now calling him to testify to, to wit, the causes of the injury. That's not in here.

They simply talk about treatment, past treatment and future treatment. And so it's a surprise to me.

I haven't had a chance to prepare, I haven't had a chance to take a deposition. I didn't take a deposition because there was no indication here that he would be so called to testify.

Second of all —

THE COURT:

Let me say this. He did just testify that the overwhelming weight of the facts — I think is the way he pharased it — was that the injuries resulted from the accident.

MR. GREENLEE:

I don't have any problem with that. I do not dispute that the pancreatic problems arose from the accident.

But now they want him to go further and say what specifically in that accident caused that injury. And that I object to because I have had no opportunity to prepare, I'm surprised, and, furthermore, in the five-year period the doctor is speculating.

THE COURT:

Is that the bulk of your objection?

MR. GREENLEE:

That's the bulk of it.

THE COURT:

Gerry?

MR. SPENCE:

Judge, he says he's surprised. I guess I'm more surprised than he is because I have never been into a court of law in my life but what the medical doctor was asked to give a causal opinion as to the cause of the injury.

That goes without saying. Medical doctors have to give some testimony.

You know, if you don't they would say, "This man isn't qualified" — as soon as they put Crawford on they will say, "Well, he isn't a doctor," and ask him what he thinks caused the injuries. You watch and see what kind of an objection we get there.

I do admit that we are out of order, and I do tell you we will tie it in with other evidence. But he is here and we have the

intent of having him testify as to his opinion based upon reasonable medical probability as to the cause of these injuries and the mechanism involved.

THE COURT:

With regard to the surprise: I'm going to allow the witness to testify on this. I think that what you are really saying, Greg, is that under our system of telling each other what a witness is going to testify to is a bad system, and I agree to that.

Ever since the Federal Rules were adopted in this state, we have basically, in listing witnesses in pretrial memoranda, have said as little as we could about what they would really testify to.

* * *

But I agree, you are basically right. We should do it better. We haven't. It hasn't been our custom.

I'm going to try to make it better, but we haven't objected here. So I don't see where we can really truthfully claim surprise here, because, as Mr. Spence says, I do think that we have gone into this question as to the causal condition with doctors always.

Now, as to your second objection on foundation, I'm not sure yet, I haven't heard all the foundation, I don't know whether — I can't say whether Dr. Freston is speculating or not. The foundation isn't complete. So I can't rule on that.

MR. MORIARITY:

Greg can cross-examine on that point.

MR. SPENCE:

He has the right to voir dire.

MR. GREENLEE:

I have not had the opportunity to examine him before. You know, it's extremely scary when you get a witness that you've never ever talked to.

I shook his hand for the first time in this courtroom after lunch.

MR. SPENCE:
I have never seen any of yours.

MR. GREENLEE:
But their depositions were taken by your people.

MR. SPENCE:
Some of them were and some weren't.

MR. GREENLEE:
It seems to me that this is a critical issue to the defendant's defense. Now, certainly I can get up there and ask him, "Doctor, what about these seat-belt injuries and whatnot," but all I'm doing there is compounding the problem that I already have.

Your Honor, I try to be fair with listing what my people are going to say and try to include those areas, all of those areas that they are expected to be called upon to testify to. That was not done in this case.

I submit to you that it was an intentional —

MR. SPENCE:
Oh, Greg, don't say that.

MR. GREENLEE:
— an intentional withholding of information from me on which I would have reacted entirely differently had they said "and the causes of his injuries."

THE COURT:
Basically, you see, I'm ruling that the tail goes with the hide. You let without objection in the doctor's testimony it was attributable to the accident.

"What is the cause of his pancreatitis?"

"The accident was."

All right. You've got that in and there's no objection. Now here is a refinement of that and I just basically think that that's what it is, is a refinement of it. That's why I say it's something that maybe we're at fault in not requiring that pretrial memoranda in greater detail.

But basically I think that has not been the Wyoming practice, and I think we will have to live with it, at least in this case. Gentlemen, let's move.

No. 78-1636 – JOHN H. SMITH v. FORD MOTOR COMPANY

DOYLE, Circuit Judge, dissenting.

The sole issue which is relied on by the majority for reversal is whether an alleged trial error consisting of the giving of an incomplete or general statement as to the testimony of a proposed expert witness, in conjunction with the naming of the witness in the plaintiff's pretrial statement, can justify the reversal of a judgment rendered following a lengthy and difficult trial and the award of a highly substantial verdict. There is not the slightest contention that the evidence is insufficient or that the claim is ill founded. Nor does it appear that the defendant made any effort by deposition or other means to obtain a detailed statement of the proposed testimony of the expert.

Some preliminary elements need to be delineated:

A.
JUSTICE DELAYED

These injuries occurred in 1973. There was a prior trial involving the wrongful deaths of the wives of the plaintiff Smith and the driver of the automobile in question, Mr. Fox. Here, we are well into the year 1980, and the end is not is sight. At the new trial there would not be any great difference, if any, in the facts. At the retrial either the testimony of Dr. Freston in person or his former testimony given at the trial below will be offered. It boils down, then, to whether or not the plaintiff is to be punished to this extent because of the action of his lawyer in not detailing the projected testimony of

Dr. Freston rather than merely describing it in general terms. Note also that this is not a case in which there was a failure to endorse the name of a witness, as a result of which surprise was claimed by Ford at the trial. We expect to show that there was no surprise in fact, conceding that the statement was not full and complete.

B.

SURPRISE IN FACT IS NOT DEMONSTRATED

Ford maintains that it had only 1-1/2 months to prepare itself, and thus its failure to take a deposition should not be counted against it. This is incorrect. The witness in question, Dr. James W. Freston, was in fact endorsed not quite 2-1/2 months prior to the trial in late March. This notice was given at a supplemental pretrial conference held on January 24, 1978. Does the time span of not quite 2-1/2 months prior to trial constitute a justification for failing to probe the details of Dr. Freston's testimony? Counsel for Ford were aware of the fact that the plaintiff, Mr. Smith, was, at that very time, being treated by Dr. Freston and was in personal contact with Dr. Freston. Certainly, this was worthy of some inquiry. But, counsel for Ford made no move, formal or otherwise, to ascertain the details. Granted, the notice was cryptic and conclusory. This raises the question whether it is permissible in an adversary proceeding such as this for the attorney for the defendant to ignore a notice which gives the name and general nature of the testimony of an expert and to run the risk incident to not making inquiry as to the details of the testimony, notwithstanding that a mere demand submitted to the judge would have compelled the plaintiff's lawyer to reveal in every detail the proposed testimony of the expert. Thus, it would not have been necessary for Ford to take a deposition. Certainly, it was hazardous in a case of this magnitude for Ford's counsel to elect to run the risk of having to cope with damaging testimony for which no specific preparation had been made (so it is claimed). Of course, there had been preparation. Ford had brought in an expert from the University of Michigan Medical School, Dr. Huelke, who was fully prepared to refute any testimony dealing with the seat belt as a cause. Perhaps this latter fact accounts for Ford's decision not to pursue the deposition.

The doubling of the damage demand by counsel for Smith to

one million dollars, which took place virtually simultaneously with the listing of the witness, gave added notice to Ford that plaintiff did not believe that there existed a void in the testimony.

Accordingly, we have a setting in which a case had been carefully prepared over a long period of time and which was in the last weeks of preparation. The issues were fully understood. Ford knew about the problem of cause as applied to the seat belt because the main deficiency relied on by the defendant was this specific element. Also, Ford was prepared to meet this issue. The fact that Ford was ready detracts from the claim of Ford that it was surprised.

The witness who was endorsed, Dr. Freston, was not any ordinary internist. He was an expert in the particular field and in this particular part of internal medicine. He had not only an M.D. degree, but a Ph. D. as well, and he was Chairman of an important department of the University of Utah Medical School. Surely none of this was ignored by Ford.

C.

THE IMPORTANCE OF THE TRIAL COURT'S FINDING

A third factor which is entitled to be weighed is the finding of the trial court that surprise did not exist. In view of the specialty of Dr. Freston and the peculiarly serious injuries of Smith, including extensive injuries to the pancreas, which could be fatal, and removal of the spleen, there was good reason for counsel to be generally aware of the foregoing testimony and to expect testimony as to causation. This issue was anticipated of each of the other medical witnesses who were deposed.

D.

FORD'S ELECTION NOT TO OBJECT WHEN DR. FRESTON WAS ASKED A GENERAL QUESTION ABOUT PROXIMATE CAUSE

A timely objection to the testimony of this witness was not given. Counsel waited until Dr. Freston had testified to one phase of proximate cause, that which had to do the the automobile collision as a cause of the injuries which were the

subject of the lawsuit. Objection was not made until the question of cause as it related to the seat belt was introduced. Only then did counsel for Ford claim surprise. The trial court considered this a waiver of objection.

E.
SURPRISE WAS NOT ESTABLISHED

Finally, the trial court had lived with this case and the predecessor. Having worked closely with the lawyers, the judge was in a good position to make a finding on the existence or nonexistence of surprise. Not a scintilla of evidence on the subject of surprise was offered by Ford. No detailed inquiry was conducted, no witness was presented, and so the reversal rests on an analysis by the majority of the circumstances surrounding this incident to the extent that they are able to squeeze favorable inferences from the basic facts, plus the mere claim that was made by counsel. This isn't much.

The circumstances at the trial do not bespeak surprise. Not only was it brought out that Dr. Donald F. Huelke, Ford's expert witness, was fully prepared on the general subject of seat belt cause, he was also ready to refute the testimony of Dr. Freston that the position of the seat belt produced the serious internal injuries. Dr. Huelke was even familiar with the Garrett and Braunstein article (the literature on which Dr. Freston relied).

The case of Tupman Thurlow Co. v. S.S. Cap Castillo, 490 F. 2d 302 (2d Cir. 1974), considered whether the party claiming surprise was prepared to cope with the evidence to which objection was made, which fact was considered pertinent in deciding whether in fact there was surprise.

* * * * * *

The preliminary facts which are stated raise a question as to why Ford refrained from deposing Dr. Freston, and whether Ford should be allowed to refrain from making any effort to ascertain the details of the testimony of an expert who is listed and to rely entirely on the initiative of the plaintiff in bringing each and every detail to its attention. Ford would

say that it was so misled by the statement that it did not consider it necessary to act. This ignores the complexity of the case, for example, the fact that the causation issue was foremost in the minds of both lawyers. A distinguished physician was named and thorough preparation required every possibility to be examined. Is it unnecessary for the adversary party to take obvious steps to protect its position? Neither side should, consistent with the spirit of the rules, be allowed to sit back and fail to take obvious action to ascertain facts. To fail to do so suggests an attempt to use the rules for the object of developing an error. The trial court was of the view that neither side was genuinely surprised, that each was trying to outmaneuver the other. If this was the case, there should not be a reversal because this punishes the innocent litigant.

The important guide to the duty to supplement requests for discovery is subsection (e) of Rule 26, an amendment which was added in 1970. It states that "A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response" except in two instances: 1) where the question is addressed to the identity and location of persons having knowledge of discoverable materials; 2) the identity of persons who expect to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.[1]

Professor James Moore in his Treatise, Moore's Federal Practice Section 26.81, explains the purpose of the amendments:

> Subdivision (e) of Rule 26 was added in 1970 to end the uncertainty that had developed over the duty to supplement. This provision imposes directly the duty to supplement

---

1. The text of Rule 26 (e) (1) is as follows:

1. A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter in which he is expected to testify, and the substance of his testimony.

answers to interrogatories seeking the identity and location of persons having knowledge of any discoverable matter, and answers to interrogatories seeking the identity of persons expected to be called as expert witnesses at the trial and the substance of their expected testimony. Further, when a party who has answered interrogatories discovers that the answers were incorrect when given, he has a duty to amend them to conform to the truth.

Along the lines suggested by Judge Ellis in *Gorsha* [v. Commercial Transport Cpr., 38 F.R.D. 188 (E. D. La. 1965)], the subdivision also provides that under circumstances in which failure to provide subsequent information would be **"in substance in a knowing concealment"** there is a duty to supplement the answer though it was correct when made.

Flexibility is provided by a provision in subdivision (e) (3) that the duty to supplement answers may be imposed by the court or by agreement of the parties. Of course the parties are free to serve new interrogatories requesting supplementation of the answers to the earlier set. (Emphasis supplied.)

Does the majority opinion impose an absolute and **exclusive** duty on a party to supplement answers to interrogatories or to amend them? It does this and more. The failure to detail the testimony, according to the majority, can be likened to an offense ***Malum in se***. It calls for imposition of the extreme penalty regardless of whether surprise, prejudice or willfulness is established.

The First Circuit in Simonsen v. Barlo Plastics Co., Inc., 551 F. 2d 469 (1st Cir. 1977), considered the consequence of plaintiff's failure to disclose the complete substance of an expert witness's testimony. It held that the consequence was within the trial court's discretion. The plaintiff in *Simonsen* had not given notice that his expert would testify to permanent unemployability of the plaintiff. The defense sought a recess in order to find a vocational rehabilitation expert. The trial court denied the motion seeking delay and the First Circuit affirmed. The court said:

PSCo argues that it should not be bound by the pretrial

order as it was surprised by testimony of plaintiff's expert, Arthur Kenison, that Simonsen might be permanently unemployable . . . . At the time the list of expert witnesses was filed, Simonsen is said to have been working on and off as a truck driver so that PSCo had no reason to anticipate any need for testimony about vocational rehabilitation. However, PSCo was informed over five months prior to trial that Kenison would be testifying as an expert and, **through discovery**, could have ascertained the substance of his testimony . . . .Moreover the complaint had alleged permanent disability. Clearly the court did not abuse its discretion in refusing to hold up the progress of the trial for the testimony of the unlisted and as yet unlocated expert. (Emphasis supplied.)

551 F. 2d at 471.

Simonsen thus places the burden on the defendant to take the initiative by deposing the witness—just the opposite of the position taken by the majority here.

The situation is far different where the expert witness is unknown and an effort is being made to call him after having failed to name him. *See* Davis v. Duplantis, 448 F. 2d 918 (5th Cir. 1971). But in that case the trial judge allowed the expert to testify notwithstanding failure to list his name as a witness in accordance with the pretrial order. The Fifth Circuit upheld the ruling, noting the severity of the sanction which denies the testimony. Thus, the court weighed the consequences of precluding the calling of the witness against the magnitude of the violation of the rule and decided that the discretion of the trial court should be upheld. The Fifth Circuit was also persuaded by the fact that the plaintiff's counsel knew that the doctor was a potential witness since he had been furnished a report before the trial and had had an **opportunity** at that time to depose him.

The Seventh Circuit has also had occasion to rule on the subject of failure to name the witnesses where knowledge of expertise was not discovered until time to the trial. *See* Sadowski v. Bombardier Ltd., 539 F. 2d 615 (7th Cir. 1976). The

witnesses in that case had been listed in the pretrial order, but had not been listed as experts. The court noted that the question was a close one, but observed that the testimony became significant during the trial and this tended to excuse the lateness of their being treated as experts. Again, the exercise of the trial court's descretion was upheld.

This court had occasion to consider the admissibility of material which had not been disclosed in a supplement to a response given in answer to an interrogatory required by Rule 26 (e) in Price v. Lake Sales Supply R.M., Ins., 510 F. 2d 388 (10th Cir. 1974). We stated:

> It is quite true that parties are under a continuing duty to supplement their responses. See 4 J. Moore, Moore's Federal Practice [Section] 26.81 (1970). Rule 26 clearly requires this. There is no indication, however, that the trial court believed that this failure to amend was a knowing concealment. In any event, it is questionable whether exclusion is the only proper penalty for failing to comply with requirement. Surely the trial judge has some discretion in selecting the sanctions and it does not appear that the court abused its discretion in this instance.

510 F. 2d at 395. We thus recognized in that case the importance of the fact that there was a lack of evidence showing a knowing concealment. It was also recognized that the use of the exclusion sanction was questionable and that the trial judge should have some discretion in selecting sanctions and that in that instance there was no reason to conclude that there had been an abuse of trial court discretion.

The majority opinion cites, among other cases, the Fifth Circuit's decision in Shelak v. White Motor Co., 581 F. 2d 1155 (5th Cir. 1978). In that case the trial court's discretion was determined to have been improperly exercised in allowing the testimony of plaintiff's expert witness, which testimony connected the plaintiff's back injuries to an accident on a defective step and also connected a heart attack to the same accident. The evidence of the causal connection of the heart attack

arose on the date of the jury selection. It is understandable that the testimony in the *Shelak* case, considering the date on which it arose, and the nature of it, justified the trial court's decision that it should be rejected. However, even in that extreme situation, there was a divided court. Judge Rubin dissented on the ground that the trial court's discretion in allowing the evidence should have been upheld. In the *Shelak* case the trial court had also allowed a witness to testify who had not been named. The Fifth Circuit ruled that receipt of this evidence was not reversible error because it did not appear that there was surprise and thus prejudice. *See* 581 F. 2d at 1159. Thus, the *Shelak* case is at odds with the proposed opinion in this case, which holds that it was error for the trial court to allow Dr. Freston to testify even in a situation in which surprise was far from clear.

Weiss v. Chrysler Motors Corporation, 515 F. 2d 449 (2d Cir. 1975), is relied on by the majority as upholding the right of a reviewing court to void the exercise by the trial court of discretion on a matter such as is presented. It is to be noted, however, that the *Weiss* case involved broad and general notice as to what the witness was going to testify to. Actually, the Second Circuit in the *Weiss* case ruled that this was not reversible error. The case was reversed for error in refusing to admit proffered evidence in rebuttal, which evidence was admissible as a matter of right and which did not become pertinent until the rebuttal. 515 F. 2d at 458, 459.

The majority opinion also relied on the case of Voegeli v. Lewis, 568 F. 2d 89, 96 (8th Cir. 1977), a malpractice case in which one of the expert witnesses for the defense changed his testimony between the time of his deposition and the time of trial. The defense had demanded through interrogatories the nature of the testimony which was being offered. The answers were inadequate and the court granted a motion to compel answers, but, again, the answer was inadequate and misleading. A second set of interrogatories was denied enforcement by the court. Also, the court allowed the defendant to call another expert witness, although, previously, counsel for the defendant had indicated that he would not be called, as a result of which there had not been voir dire examination of the jury concerning

the witness. The Court of Appeals for the Eighth Circuit reversed the case and remanded it to the trial court, saying that there had been an abuse of discretion by that court growing out of the trial court's having failed to enforce its original order compelling answers to interrogatories in the case of one of the experts who changed his testimony. The court said, in addition, that the plaintiff was deprived of the opportunity to voir dire with respect to the other expert. *Voegeli* is so complex and different from the case at bar that it is not an effective authority in this case, which is limited to an objection to allegedly surprise expert testimony, the substance of which was claimed to have produced surprise.

There is one other complaint by the majority and that is that Ford was allowed only 10 minutes to prepare cross-examination. The majority does not mention the fact that the 10 minutes was all that was requested. Moore's Federal Practice paragraph 59.08[2] states that the surprised party should move for a continuance at the time of the surprise or otherwise he will be considered as having waived his objection. The cases cited by Moore are Jackson v. MFA Mut. Ins. Co., 169 F. Supp. 638 (W.D. Ark. 1959); Campbell v. District of Columbia, 153 F. Supp. 730 (D.D.C. 1957), *aff'd* 254 F. 2d 357 (D.C. Cir. 1958); Dow v. Carnegie-Illinois Steel Corp., 70 F. Supp. 1016, 1019 (W.D. Pa. 1947), **rev'd on other grounds,** 165 F. 2d 777 (3rd Cir. 1947); Beardsley v. Howard & Bullough American Mach. Co., 176 F. 619 (C.C. D.R.I. 1910). *Cf.* Tabatchnick v. G.D. Searle, 67 F.R.D. 49 (D.N.J. 1975).

In summary:

The finding of the trial judge that surprise was nonexistent is of high importance of these reasons:

1) The cases show that actual existence of surprise is essential. Also necessary is, of course, prejudice.

2) Constructive surprise, as discussed in the majority opinion, without more, surely is not enough. Surprise implied in law will not suffice. The surprise must be real.

3) The evidence of surprise is meager. There exists, of course, the claim made in open court by Ford's counsel, but this is

not evidence. It is merely an allegation. If, indeed, this seasoned and experienced trial lawyer was surprised, that indeed would be surprising given the exposure that he has had in this case. In fact, both sides have lived with the case for many years and they were sensitive to the issue of seat belt cause alleged by plaintiff and defended by Ford. Both sides knew that plaintiff had to come forward with evidence establishing that the seat belt caused the harm. Furthermore, the conduct of counsel for Ford during the trial showed that he was alert to the issue and indeed apprehensive about the special testimony of Dr. Freston on the subject, for he was quick to distinguish between general causation and the specific causation involved here.

In the face of the foregoing, how can the majority demonstrate the plain error necessary to a substitution of its judgment for that of the trial court?

We mention one final point. The Rules of Civil Procedure do not allow counsel on one side to depend on his opponent for every item of evidence that the opponent is going to offer. The Rules contemplate the identification of witnesses and subject matter so as to permit the adversary to take depositions or to seek interrogatories or move for a more detailed statement as to what the evidence is going to be, but all of these avenues are open and to place all of the burden on the plaintiff to the detriment of his client is, to say the least, grossly unjust.

In closing, there is no gainsaying that the sanction imposed was excessive considering the circumstances, including the length and difficulty of the trial and the fact that there is no real issue as to Ford's liability.

This was a well conducted trial, as lengthy and complex trial go. Unfortunately, it is impossible to have a perfect trial, human fallibility being considered. This is especially true from the standpoint of technical perfection. This does not mean that perfection should not be sought after, but there is not an indication that this goal was ever abandoned in the present case.

For all of these reasons, I respectfully disagree with the reasoning and conclusion of the majority opinion.

APPENDIX B

Order Denying Petition for Rehearing
in Court of Appeals

SEPTEMBER TERM – September 16, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

JOHN H. SMITH,	)	
	)	
Plaintiff-Appellee,	)	No. 78–1636
	)	
vs.	)	
	)	
FORD MOTOR COMPANY,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of the petition of appellee for rehearing with suggestion for rehearing in banc.

Upon consideration whereof, it is ordered:

1. The petition for rehearing is denied by the panel that rendered the decision sought to be reheard. Judge Doyle voted to grant rehearing.

2. The suggestion for rehearing having been transmitted to the members of the panel and to the judges of the Court who are in regular active service and a vote having been taken, the suggestion for rehearing in banc is denied. Judge Doyle voted to grant rehearing in banc.

/s/ _____
HOWARD K. PHILLIPS, Clerk

APPENDIX C

Petition for Rehearing
in Court of Appeals
Without Exhibits

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN H. SMITH,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 78-1636
	)	
FORD MOTOR COMPANY,	)	
	)	
Defendant-Appellant.	)	

PETITION OF PLAINTIFF-APPELLEE, JOHN H. SMITH FOR A REHEARING WITH SUGGESTION OF REHEARING EN BANC

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Attorneys for Plaintiff-Appellee

July, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN H. SMITH,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 78-1636
	)	
FORD MOTOR COMPANY,	)	
	)	
Defendant-Appellant.	)	

PETITION OF PLAINTIFF-APPELLEE, JOHN H. SMITH FOR A REHEARING WITH SUGGESTION OF REHEARING EN BANC

The Plaintiff-Appellee, John H. Smith, respectfully petitions this Court for a rehearing with suggestion of rehearing **en banc.**

Reasons Why The Petition for Rehearing Should Be Granted And Why The Rehearing Should Be En Banc

This Petition for Rehearing en banc should be granted for the following reasons:

(1) A sharply divided panel of this Court has substituted its discretion for that of the trial judge by completely **misapprehending** and desregarding **the Record** by finding nothing in the Record countering Ford's claim of surprise and prejudice, (Opinion p. 28), when in fact Judge Brimmer made a specific factual finding of no surprise. (App. p. 267).

(2) The majority completely **misapprehended** and disregarded **the Record** in finding that Dr. Freston testified that the injury was caused by a **defective** seat belt.

(3) The majority allows Ford's Appellate Counsel to appeal on premises not properly raised at the trial level, denying Appellee due process. This action permitted the majority to make erroneous factual findings.

(4) The far-reaching ramifications of the majority ruling upon the pretrial practice and discretion of the trial judges in this Circuit must be examined en banc as it is a direct departure from prior rulings of this Circuit and the Fifth, Seventh and Eighth Circuits, as well as the Supreme Court.

From the foregoing, it is urged that this case be reheard **en banc** under Rule 35 (a), R.R.App.P.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND THE MAJORITY'S FINDING WAS BASED UPON AN ERRONEOUS PREMISE:

(1) One of the best protected rules of Appellate Procedure is that the discretion of a trial court judge will not be disturbed absent clear and convincing evidence of an abuse. *Bosse v. Ideco Division of Dresser Industries,* 412 F. 2d 567 (10th Cir. 1969). The majority, at Page 28 of the Opinion concluded, "We find nothing in the Record countering Ford's claim of surprise and prejudice". This finding is contrary to the Record. The issue was argued in Chambers (A-262-269). There are no **facts** in the Record to support Ford's Claim of surprise or prejudice. The Record, however, does disclose Judge Brimmer's finding: "I'm going to try to make it better, but **we haven't objected here. So I don't see where we can really truthfully claim surprise here,** because, as Mr. Spence says, I do think we have gone into this question as to **causal condition with doctors always."** (A-267).

Three points are made by Judge Brimmer:

(1) No objection to how information was listed in the pretrial;
(2) No surprise;
(3) The doctors always testify to causation.

There is absolutely no abuse of discretion by Judge Brimmer. He knew his case, the attorneys, the atmosphere, and the applicable rules of practice and procedure. Considerable defference should be accorded his interpretation and application of these rules, *Martinez v. Thrifty Drug and Discount Company*, 593 F. 2d 992 (10th Cir. 1978).

(2) There is absolutely no evidence Judge Brimmer misconstrued his rules. It is submitted that Judge Brimmer would have abused his discretion had he granted the relief requested based upon the Record before him at that time. There were no objections made prior to trial that would have put the parties on notice and which, if made, would have permitted the Court to make rulings that would not have prejudiced one side or the other. The rules require a record be made at the time so the court and counsel are given an opportunity to correct the problem if one exists. To permit Appellate Counsel to succeed without a proper timely record amounts to appeal by ambush — not only of opposing counsel but of the trial judge as well. Prior to trial there were no requests for updated interrogatories; no request for more information on the witnesses (even though Plaintiff's counsel had offered said information, see A-131 attached); no objection to the procedure used at the pretrial, no request for additional information at the pretrial (A-78-106); and no deposition was taken, with the excuse given to the Court on the Record that Ford didn't take the time. Trial courts in the heat of battle are called upon to make rulings based on the record and facts and representations of counsel **at that time.** Based upon the representations and facts at the time, it is clear that Judge Brimmer did not abuse his discretion. The Record did contain matters countering Ford's claim of surprise and

prejudice and contained the trial court's finding of no surprise. The majority erred in its findings based upon an erroneous premise and, therefore, a rehearing should be granted.

Misapprehension of the Record re Causation:

1. The majority, at Page 29, states that Dr. Freston testified, ". . . the injuries were caused by a **defective** seat belt". They went on to say at Page 30, "The challenged testimony provided crucial, **non-cumulative** evidence on the question of whether a **defective** seat belt aggravated or enhanced Mr. Smith's injuries. The majority placed so much reliance on **defective** that it was underscored in the Opinion. NOWHERE IN THE RECORD DOES DR. FRESTON TESTIFY THAT THE INJURY WAS CAUSED BY A **DEFECTIVE** SEAT BELT. It was never there.

2. Dr. Freston's testimony was clear and concise: "The evidence is good that the seat belt was involved in that injury." (App. Vol. II p. 273). There is absolutely no reference anywhere in the Record where Dr. Freston says a **defective** seat belt caused the injury. He simply, as a part of his diagnosis, isolated the cause of the trauma.

3. The issue of the seat belt being defective was addressed directly in the testimony of Professor Crawford. This expert engineer testified that the defective seat belt, as well as the whole defective passenger restraint system, caused the injury. An example of where the **defective** seat belt testimony derives comes from Crawford's testimony at p. 559:

"Q. Do you have an opinion as to the effectiveness of the seat belt attachment design in providing reasonable protection to the passengers, from the seat belt, in 25 to 35 mile per hour crashes of the kind involved in this case?

A. Yes, sir, I do.

Q. What is your opinion:

A. The seat belt location is not at 45 degrees and it tends **to cause injury to an individual wearing it in crashes of this nature.**" (App. Vol. III, p. 559) See also: pp. 469, 502-511, 559 to 572 of the Appendix for the other opinions re causation.

4. A careful review of the Record clearly shows that causation was per Professor Crawford and that Dr. Freston did not render an opinion that the seat belt was **defective,** thus, the majority premised its opinion on a misapprehension of the Record.

The New Pretrial Practice:

1. **Ford's trial counsel,** by letter to the Court on January 5, 1978, **suggested the exact procedure that he wanted** to follow for final **discovery and listing of witnesses.** Judge Brimmer exercised his discretion and adopted Ford's plan. (The letter is attached). **Dr. Freston was listed in the manner Ford requested.** His medical **records** were given to Ford which spoke of **"seat belt trauma".** Plaintiff's counsel offered to meet with Ford's counsel and discuss any problem areas in testimony (App. p. 131 attached). Ford did not respond nor depose Dr. Freston who was the treating physician and not a hired expert as was Ford's Dr. Huelke. The trial court found that the parties had cooperated well and no objections to the procedure by Ford or discovery motions were pending when the trial began.

2. The majority now says this was bad practice and completely rewrites the pretrial practice for this Circuit. The trial judge's discretion in controlling discovery and structuring the pretrial is wiped out. The majority here now dictates mini-trials which in a complex case such as this could last for days.

3. The majority found the Wyoming practice is in accord with its rationale and cites *Ford Motor Co. v. Kuhbacher,* 518 P.2d 1255 (Wyo. 1974). Even a cursory reading of *Kuhbacher* shows that the majority misread the case. In that case, the Wyoming Supreme Court allowed a wit-

ness to testify who was not even named. (The relevant portion of the Opinion is attached). No new pretrial procedure was retroactively applied to the Plaintiff in *Kuhbacher.* (The Defendant incidentally was Ford Motor Co., Appellant).

4. The majority here usurps the trial judge's discretion concerning pretrial discovery which is not in accord with the Supreme Court or the other circuits. The new interpretation of Rule 16 will cause pretrial conferences to become trials on paper instead of in the courtroom. This is contrary to *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962); *McCargo v. Hendrick*, 545 F.2d 393 (4th Cir. 1976); *Davis v. Duplantis*, 448 F.2d 918 (5th Cir. 1971).

5. The majority directs a new maze of complex and detailed pretrial procedures. The remedial sanctions against Judge Brimmer are applied retroactively and Mr. Smith suffers. The Wyoming procedure has never been criticized before and even Ford's trial counsel made no objection. In fact, by letter, Ford's trial counsel invoked the very custom and practice Ford's appellate counsel succeeds in overturning. The District of Wyoming prides itself and its Docket has been nationally recognized for its speed and efficiency. This decision ends that. This Court's own precedent is even overruled. *Martinez v. Thrifty Drug and Discount Co.*, 593 F.2d 992 (10th Cir. 1978). See e.g. *Silas v. Sears, Roebuck & Co., Inc.*, 586 F.2d 382 (5th Cir. 1978); *Identi Seal Corp. of Wisconsin v. Positive Identification*, 560 F.2d 298 (7th Cir. 1977). (A pertinent article appearing in the 1980 Edition of *Litigation* is also attached.)

SUMMARY

This precedent-setting Opinion which is in conflict with rulings in four other circuits will have far-reaching ramifications on a trial judge's discretion as well as on pretrial practices. The critical factors relied on by the majority for reversal, i.e. Dr. Freston saying the seat belt was defective and there being nothing in the Record countering Ford's allegations of surprise and

prejudice are both incorrect. The Appellant was allowed to lay silent, not required to make a record, and did not afford the trial court an opportunity to correct an alleged error. The majority ruling changes the guidelines of appellate procedure and without notice changes the existing accepted procedures of pretrial practice in the District of Wyoming after the fact. This adds up to appeal by ambush which is resulting in a prejudicial ruling against an innocent Wyoming victim of a defective corporate product. A reversal not only makes bad law, but requires a new trial of a case over eight years old because defense counsel chose not to take a deposition and now claims surprise.

Since justice delayed is justice denied and as this matter has been on appeal for two years, a careful review of this dangerous precedent-setting reversal by a sharply divided court is only just and proper.

CONCLUSION

The Petition for a Rehearing en banc should be granted.

DATED this 31st day of July, 1980.

Respectfully submitted,

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Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of July, 1980, I did serve the foregoing Petition of John H. Smith for a Rehearing with Suggestion of Rehearing **en banc** by mailing two copies, first-class postage prepaid, to the following:

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of Counsel for John H. Smith
Plaintiff-Appellee

Misapprehension of the Record:

(1) **The majority opinion reads:**

"The critical nature of Dr. Freston's testimony convinces us that Ford was prejudiced in the presentation of its case Dr. Freston not only testified that Plaintiff's injuries were caused by the seat belt; he also testified that in his opinion, based on the article he had read, the injuries were caused by a defective seat belt." (Opinion p. 29)

(2) **Dr. Freson did not so testify. The Record shows the following exact testimony.**

"Q. Do you have an opinion based upon reasonable medical probability as to the cause. . . as to what caused the injuries (to the) spleen and to the pancreas in the case at hand?

Mr. Greenlee: (Objection)

The Court: (Overruled)

A. Yes, I have an opinion.

Q. (By Mr. Spence) Would you state to the jury what your opinion is?

A. **Yes, my opinion is that the probability is overwhelming that the injury to the pancreas resulted from the automobile accident.**

And specifically, the evidence is good that the seat belt was involved in that injury."

(App. Vol. II, p. 273-274)

Attachment No. 1

No. 80-973

In the
Supreme Court of the United States

October Term, 1980

JOHN H. SMITH,
Petitioner,

vs.

FORD MOTOR COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

---

BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

Question Presented For Review

Respondent Ford Motor Company ("Ford") would restate the "Questions Presented" by petitioner ("Smith") as follows:

Whether the Court of Appeals erred, when, applying accepted standards of appellate review, it concluded that the trial court abused its discretion in allowing one of petitioner's treating physicians, Dr. Freston, to give expert opinion testimony that Smith's internal injuries were caused by a defective seat belt, where:

(a) As to Dr. Freston's expert opinions, Smith failed to answer interrogatories propounded pursuant to Rule 26(4)(A) and to supplement the answers to interrogatories as required by Rule 26(e)(1)(B), Fed. R. Civ. P.;

(b) Contrary to Rule 8 of the Rules of the United States District Court for the District of Wyoming and contrary to the trial court's own pretrial order, which required a fair summary of each witness' testimony, the summary as to Dr. Freston spoke only in terms of treatment and prognosis, giving no warning or indication of his opinion testimony as to causation or defectiveness; and

(c) As a result of its surprise due to the misleading disclosure, Ford was denied the opportunity to effectively cross-examine this crucial expert witness by showing that the "literature" upon which he relied for his opinion did not in fact support that opinion, in derogation of the underlying principles of Rules 703 and 705, Fed. R. Evid.

List of Parties

In response to Rule 28.1 of this Court's Rules, respondent Ford Motor Company states that it has no parent company. Ford's less than wholly-owned subsidiaries are: *United States:* Eveleth Taconite Company; Humboldt Mining Company. *Foreign:* Ford Motor Company (Belgium) N.V.; Bongatti S. A. Industria e Comercio de Radiadores (Brazil);

Ford Motor Company of Canada, Ltd.; Ford Motor Company A/S (Denmark); O/Y Ford A/B (Finland); Ford-Werke Aktiengesellschaft (Germany); Ford Nederland N.V. (Holland); Hokkai Ford Tractor Co. Ltd. and Japan Automatic Transmission Company, Ltd. (Japan); Ford Motor Company Aktiebolag (Sweden); and Ford Lio Ho Motor Company Ltd. (Taiwan).

In addition to the foregoing, Ford has varying ownership interests in over 200 Ford automotive, truck or tractor dealerships throughout the United States. Those dealerships have not been listed, as it would appear that any member of the Court would know of his ownership interest in such a Ford dealership. Should the Court desire such a listing, Ford will, of course, supplement its response.

Table of Contents

	Page
Question Presented	i
List of Parties	i
Table of Contents	iii
Table of Authorities	vi
Rules of Procedure and Evidence Involved	1
Opinions Below	1
Statement of the Case	2
Summary Why the Writ Should Be Denied	5
Reasons Why the Writ Should Be Denied	6
I. The Opinion Below Correctly Found An Abuse of Discretion	6
A. The Opinion Below	7
1. Prejudice or Surprise in Fact	7
2. Ability to Cure the Prejudice Without Disruption of the Trial	9
3. Willfulness or Bad Faith	10
B. The Decision Below Properly Gives Effect To This Court's Policies Regarding The Discoverability, Disclosure and Admissibility Of Expert Opinion Evidence	11
II. The Petition Presents No Conflict Either As To The Appropriate Scope of Appellate Review For Abuse Of Discretion Or The Substance Of Pretrial Procedures	12
A. The "Substitution of Discretion" Conflict	12
B. The "Mini Trials" Conflict	14

Table of Contents

Page

III. Any "Justice Delayed" In This Case Is As Attributable To Petitioner As It It Is To The Judicial System 17

A. Chronology of Events 17

B. The Appellate Court Expeditiously Considered and Decided This Case 18

C. Smith's Presentation Here Would Be Insufficient To Support A Criminal Defendant's Assertion Of A Denial Of A Speedy Trial 18

Conclusion 20

Appendices

Appendix A 1a
Opinion Below —

Appendix B 47a
Rule 26 (b) (4) (A), Fed. R. Civ. P. 47a
Rule 26 (e) (1), Fed. R. Civ. P. 47a
Rule 703, Fed. R. Evid. 48a
Rule 705, Fed. R. Evid. 48a

Table of Authorities

Cases	Page
Barker v. Wingo, 407 U. S. 514 (1972)	19
Case v. Abrams, 352 F.2d 193, 196 (10th Cir. 1965)	10
Coleco Industries, Inc. v. Berman, 567 F.2d 569 (3d Cir. 1977), *cert. denied*, 439 U.S. 830 (1978), *rehearing denied*, 439 U.S. 998 (1978)	10
Dandridge v. United States, 265 F.2d 349 (D.C. Cir. 1959)	19
Davis v. Duplantis, 448 F.2d 918 (5th Cir. 1971)	8, 12, 14
Doescher v. Estelle, 454 F. Supp. 943 (N.D. Tex.), *appeal dismissed*, 597 F.2d 281 (5th Cir. 1978)	18
Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977)	16
Ely v. Reading Company 424 F.2d 758, 764 (3d Cir. 1970)	9, 10
Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978)	5
Globe Cereal Mills v. Scrivener, 240 F.2d 330, 335 (10th Cir. 1956)	10
Identiseal Corp. of Wisconsin v. Positive Identification Systems, Inc., 560 F.2d 298 (7th Cir. 1977)	16
Jones v. Union Auto. Indemn. Ass'n. of Bloomington, Ill., 287 F.2d 27 (10th Cir. 1961)	8
Link v. Wabash Railroad Co., 370 U.S. 626, *rehearing denied*, 371 U.S. 873 (1962)	12, 13
Manbeck v. Ostrowski, 384 F.2d 970, 975 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 966 (1968)	7
Marx & Co., Inc. v. Diners' Club, Inc., 400 F. Supp. 581, 586 (S.D.N.Y. 1975), *modified on other grounds*, 550 F.2d 505 (2d Cir. 1977)	9
McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976)	12, 15

Table of Authorities

Cases *Page*

Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 905 (3d Cir. 1977) 9, 10

Moore v. Sylvania Electric Products, Inc. 454 F.2d 81, 84 (3d Cir. 1972) 10

Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961) 15, 16

Payne v. S. S. Nabob, 302 F.2d 803, 807 (3d Cir.), *cert. denied,* 371 U.S. 870 (1962) 10

Rodrigues v. Ripley Industries, Inc., 507 F.2d 782 (1st Cir. 1974) 8, 10

Shelak v. White Motor Co., 581 F.2d 1155, 1159-60 (5th Cir. 1978) 10

Silas v. Sears, Roebuck & Co., Inc., 586 F.2d 382 (5th Cir. 1978) 15, 16

Simonsen v. Barlow Plastics Co., Inc., 551 F.2d 469 (1st Cir. 1977) 8

State v. Lagerquist, 176 S.E.2d 141 (S.C.), *cert. denied,* 401 U.S. 937 (1970) 19

Tabatchnick v. Searle & Co., 67 F.R.D. 49, 56-57 (D.N.J. 1975) 10

United States v. Auerbach, 420 F.2d 921 (5th Cir. 1969), *reh. denied,* 423 F.2d 676, *cert. denied,* 399 U.S. 905 (1970) 19

United States v. Martin, 587 F.2d 31 (9th Cir. 1978), *cert. denied,* 99 S. Ct. 1222 (1979) 19

United States v. Mills, 434 F.2d 266 (8th Cir.), *cert. denied,* 401 U.S. 925 (1970) 19

Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1977) 10

Washington Hospital Center v. Cheeks, 394 F.2d 964, 966 (D.C. Cir. 1968) 8, 9

Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc. 356 F.2d 371 (9th Cir.), *cert. denied,* 384 U.S. 963 (1966) 8

Table of Authorities

Page

Constitution and Statutes

6th Amendment, U.S. Constitution 18, 20
Speedy Trial Act, 18 U.S.C. § 1361 ..... 19, 20

Federal Rules

Rule 16, Fed. R. Civ. P. 5, 15, 16
Rule 26 (b) (4) (A) (i), Fed. R. Civ. P. 2, 5, 11, 14
Rule 26 (e) (1) (B), Fed. R. Civ. P. 2, 5, 11, 15
Rule 37, Fed. R. Civ. P. 16
Rule 703, Fed. R. Evid. 5, 7, 11
Rule 705, Fed. R. Evid. 5, 7, 11, 12

No. 80-973

In the Supreme Court of the United States

October Term, 1980

JOHN H. SMITH,
Petitioner,
vs.
FORD MOTOR COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 626 F.2d 784. Because the petition's reproduction of that opinion has several pages from the opinion out of order, making it difficult to read, Ford has reproduced it in the appendix to this brief. (App. A, 1a)

RULES OF PROCEDURE AND EVIDENCE INVOLVED

In addition to those referenced in the petition (p. 2), the following Federal Rules of Civil Procedure and Federal Rules of Evidence are involved:

Rule 26(b)(4)(A), Fed. R. Civ. P.

Rule 26(e)(1)(B), Fed. R. Civ. P.

Rule 703, Fed. R. Evid.

Rule 705, Fed. R. Evid.

These Rules are reproduced in Appendix B (App. B, 47a).

STATEMENT OF THE CASE

This is an action at law wherein petitioner John H. Smith ("Smith") sought damages for enhanced personal injuries allegedly caused by seat, seat track and seat belt defects in a 1970 Ford four-door Thunderbird which was involved in a near head-on collision with a pickup truck in January of 1973. Jurisdiction was based upon diversity of citizenship. At the time of the accident, Smith was seated in the right front seat of the Thunderbird and was using his lap belt. Smith filed this action in July of 1976, some three and one-half years after the accident. (App. A, 2a). The jury trial commenced on March 29, 1978, nineteen months after the filing of the complaint. In January of 1978, some five years after the accident, Smith was examined for the first time by Dr. James Freston, Salt Lake City, Utah (Pet. p. 4). By a "Supplemental Pretrial Submission" of January 24, 1978, some two and one-half months before trial, Smith's counsel advised Ford that:

> "Dr. Freston . . . will testify as to his medical treatment of the Plaintiff, as well as to his prognosis." (App. A, 5a)

During discovery, Ford requested of Smith, pursuant to Rule 26(b)(4)(A)(i), Fed. R. Civ. P., that he identify the expert witnesses, including physicians, that may be called to testify, and as to each, to give a brief description of his testimony and to set forth any opinions he may be called upon to give along with the facts upon which the opinions will be based. (App. A. 4a). As to Dr. Freston, there was no response by Smith to these requests despite the supplementation requirements of Rule 26(e) Fed. R. Civ. P. (App. A, 5a).

Rule 8 of the local District Court Rules provides that the parties are to exchange a list of witnesses together with a brief summary of their testimony, stating further that, "generalized summaries are not acceptable." App. A, 20a).

Furthermore, the trial court had implemented the referenced requirements of Rule 8 in its pretrial order. (App. A, 5a).

Despite the trial court's pretrial order and the requirements of the Federal Rules of Civil Procedure as well as local Rule 8, Ford was never advised, in any manner, that Dr. Freston would testify to anything except his medical treatment of Smith and his prognosis. (App. A, 23a).

The accident in which Smith was involved did, as suggested in his petition, cause injury and the death of others. (Of the 5 people involved in both vehicles, 3 died, and the two survivors, Smith, and the Thunderbird driver, Ralph Fox, were seriously injured, Smith more so than Fox). However, petitioner attempts to assert some sort of commonality or guilt by association between the injuries sustained by the rear seat passengers of the subject vehicle, both of whom died, and those of Smith, who was the occupant of the right front seat. The fact of the matter is that the injuries were not identical; the front and rear seats are wholly different; the seat belts, seat belt angles and seat belt anchorages are not the same; Smith complained here of an allged lack of strength of the front seat track, there being no tracks for the rear seat; and the front seat "environment" is substantially different than that in the rear.

Petitioner also implies that the issues, witnesses and proof in the two actions — the prior one for wrongful death and the instant case — were so identical that Ford's counsel should have known about the potential testimony of Dr. Freston. The petition leaves the erroneous implication that Dr. Freston testified in both cases. That is not so. As noted above, the existence of Dr. Freston was brought to Ford's attention less than two and one-half months prior to trial through Smith's Supplemental Pretrial Submission.

As the opinion below points out, Dr. Freston's testimony was described in the Supplemental Pretrial Submission almost identically to that of two other listed treating

physicians whom Ford did depose. Deposition inquiry of these other physicians as to their study of seat belt related injuries resulted in negative responses; neither physician had expert opinions relating to Smith's injuries being caused by a defective seat belt. (App. A, 23a).

> "Thus the addition of Dr. Freston to the list of witnesses, with the same general description of his testimony, could have only misled Ford into believing that his testimony would relate solely to plaintiff's injuries and not to their relationship to a defective seat belt." (App. A, 23a-24a).

Dr. Freston *did,* contrary to Smith's assertion (Pet., p. 5) testify that the seat belt in the vehicle in question was defective, but he did not use that conclusory term. He said:

> "Q. [Mr. Spence] . . . Now, when you find an injury as high as the pancreas, what does that mean to you?
>
> A. [Dr. Freston] Well, something unusual has happened; something out of the ordinary.
>
> Q. With respect to the functioning of the seat belt?
>
> A. Yes.
>
> * * * *
>
> Q. What do you find in that regard?
>
> A. I find that if the seat belt *isn't functioning properly* and is over the abdomen rather than over the hips, the injuries tend to occur higher. And we start to see rupture of the spleen and we start to see injuries to the pancreas." [emprasis added]. (App. A, 8a).

Dr. Freston buttressed his opinion through a misreading of an article published by Garrett & Braunstein entitled *The Seat Belt Syndrome* (1963). Based upon his reading of that article the chances of pancreatic injury from

a properly functioning seat belt were "about one in a thousand." (App. A, 26a). As pointed out by the Court of Appeals, the article does not support the inference about injuries from defective as opposed to properly functioning seat belts.[1]

Dr. Freston's testimony, relating Smith's medical injuries to a defective seat belt was noncumulative and provided an essential link in Smith's case.

SUMMARY OF WHY THE WRIT SHOULD BE DENIED

I. The Court of Appeals correctly applied accepted principles of appellate review in determining that the trial court abused its discretion in allowing the previously undisclosed expert testimony as to causation and defect. The combination of Smith's inadequate and misleading description of the expert's testimony and the trial court's receipt of that evidence destroyed the carefully balanced relationships between Rules 26(b)(4)(A)(i) and 26(e)(1)(B) Fed. R. Civ. P. and Rules 703 and 705, Fed. R. Evid., and deprived Ford of a fair trial. The opinion below correctly recognizes and restores those relationships by requiring a new trial.

II. The opinion below conflicts with no decision of this Court, nor is there a conflict among the Circuit Courts regarding the appropriate scope of appellate review for abuse of discretion nor as to the factors considered in reaching a determination regarding whether there has been an abuse of dis-

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[1] No other expert in this or the prior case, *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978) had referenced or relied upon the Garrett & Braunstein article. Counsel for Ford had never seen the article until it was handed to him during his cross-examination of Dr. Freston.

cretion in the admission or exclusion of evidence. There has been no unwarranted appellate interference here with the trial court's traditional powers to control discovery, pretrial procedures or the conduct of trials. Nothing in the opinion below requires elaborate or complex "mini trials;" rather the court has simply enforced the minimum disclosure requirements of the Federal Rules of Civil Procedure and the district court's own local rules, which reduce surprise and enhance the orderly conduct of trials. The opinion below holds that the trial court's abuse of discretion deprived Ford of a fair trial.

III. There was no justice delayed in this case, and the chronology of the proceedings below hardly presents an occasion for either censuring the appellate court or for the imposition by this Court of the petitioner's undefined "guidelines" upon the Courts of Appeals and District Courts. In the name of "speedy justice," petitioner would make the trial court's decisions in the exercise of its discretion absolutely immune from review, eliminating the judicial system's most important means of guaranteeing a fair trial.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Opinion Below Correctly Found An Abuse of Discretion.

The petition notwithstanding, this case is indistinguishable from scores of appellate decisions where the issue is whether the trial court abused its discretion in either accepting or rejecting evidence at the trial over objections based upon pretrial non-disclosure or inadequate disclosure, resulting in surprise and prejudice.

This analysis, "frequently involves a delicate balance of competing considerations, variable from case to case, in order that the decision may be soundly made." *Manbeck v. Ostrowski*, 384 F.2d 970, 975 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 966 (1968). Not surprisingly, the disparate facts and circumstances presented by each case yield disparate results.

A. The Opinion Below

The appellate court here in reaching its conclusion of abuse of discretion considered whether there was prejudice to Ford or surprise in fact; whether there was a means of curing the prejudice available to Ford without disruption of the trial, and whether bad faith or willfullness need be found.

1. Prejudice or Surprise in Fact

Several factors relevant to prejudice and surprise were considered below: (1) the importance of the controverted testimony – the court found it to be non-cumulative, "crucial" and "critical;" (2) the prejudicial impact upon Ford's defense – the inadequate description of Dr. Freston's testimony "misled Ford into believing that his testimony would relate solely to plaintiff's injuries and not to their relationship to a defective seat belt." (App. A, 23a-24a) "Ford was entitled to rely on the summary of testimony . . . ." (App. A, 24a). While Dr. Freston's opinions were vulnerable on cross-examination, the lack of pretrial discovery contemplated by Rules 703 and 705, Fed. R. Evid. prevented effective cross-examination of this critical witness:

> "If Ford had been apprised in advance of Dr. Freston's testimony, it could have taken his deposition, discovered the article and been well prepared at trial to cross-examine him about his conclusions." (App. A, 26a).

It is clear that the misleading nature of the summary excused Ford from pursuing pretrial discovery of Dr. Freston. (App. A, 28a n.9).

The factor of surprise or actual prejudice and the issues of whether the surprise was justified or the result of attorney misfeasance or nonfeasance are often discussed by appellate courts in considering whether there has been an abuse of discretion. *Washington Hospital Center v. Cheeks,* 394 F.2d 964, 966 (D.C. Cir 1968) (" . . . we must assume Appellant's counsel was prepared to cross-examine all opposing expert medical witnesses on the expectation that they would testify consistent with the theory of Appellee's case." Surprise cured by allowing recess and deposition of new medical expert); *Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc.,* 356 F.2d 371 (9th Cir.), *cert. denied,* 384 U.S. 963 (1966) (no objection to introduction of post-complaint damanges evidence; no surprise, no showing that defendant was unprepared to meet the evidence); *Simonsen v. Barlo Plastics Co., Inc.,* 551 F.2d 469 (1st Cir. 1977) (preclusion of cumulative evidence of borderline relevance not prejudicial. No surprise as to expert's testimony of total unemployability of plaintiff where the expert was listed five months before trial and where complaint alleged permanent disability); *Rodrigues v. Ripley Industries, Inc.,* 507 F.2d 782 (1st Cir. 1974) (trial court properly excluded evidence of an issue not set forth in pretrial order on which defendant was not fairly apprised); *Jones v. Union Auto. Indemn. Ass'n of Bloomington, Ill.,* 287 F.2d 27 (10th Cir. 1961) (error of preclusion of testimony harmless where testimony could not change the result); *Davis v. Duplantis,* 448 F.2d 918 (5th Cir. 1971) (full disclosure of witnesses' testimony made sufficiently in advance to preclude surprise; the expert should have been deposed).

The foregoing cases demonstrate that the Court of Appeals here correctly applied the appropriate factors relating to surprise and prejudice.

2. **Ability to Cure the Prejudice Without Disruption of the Trial.**

In view of the complexity of the subjct matter of the testimony and uniqueness of the basis for Dr. Freston's opinions on causation and defectiveness, the Court of Appeals held that the 10 minute recess granted Ford to prepare for cross-examination was inadequate and that a continuance of sufficient duration to adequately cure the prejudice would have been impracticable and disruptive of the trial. (App. A, 28a).

The Tenth Circuit's analysis tracks other decisions where the inquiry concerns whether the availability of discovery either immediately before the trial or during a continuance in the trial adequately cured the prejudice. *Ely v. Reading Company*, 424 F.2d 758, 764 (3d Cir. 1970) (failure to notify as to proposed expert testimony; plaintiff "failed to apprise his adversary of information utterly essential to the preparaion of a defense," and preclusion proper); *Marx & Co., Inc. v. Diners' Club, Inc.*, 400 F. Supp. 581, 586 (S.D.N.Y. 1975) *modified on other grounds*, 550 F.2d 505 (2d Cir. 1977) (previously unlisted expert rebuttal witness allowed to testify; adversary failed to take advantage of opportunities to depose after disclosure of the subject matter of his testimony and prior to rebuttal testimony. On appeal it was held that the substance of the witness' testimony was improper as it exceeded the permissible bounds of Rule 704, Fed. R. Evid. regarding the ultimate issue); *Washington Hospital Center v. Cheeks, supra* (previously unlisted medical expert deposed during continuance — deposition cured the defect); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 905 (3d Cir. 1977) (preclusion an abuse where bench trial could have been adjourned for a few days for discovery).

The Court of Appeals properly concluded that under the circumstances here a continuance would have disrupted the trial and thus preclusion was required. *Shelak v. White Motor Co.*, 581 F.2d 1155, 1159-60 (5th Cir. 1978).

3. Willfulness or Bad Faith.

Finally, in apparent disagreement with *Meyers v. Pennypack Woods Home Ownership Ass'n, supra,* which seems to require willfulness or bad faith as justification for preclusion, the court below determined those factors to be unnecessary. The court noted that from the standpoint of the party prejudiced it makes little difference whether the surprise is intentional or negligent (App. A, 29a). The court also noted that where as here no excuse is offered for the inadequate disclosure, the Third Circuit itself has distinguished *Meyers* and held admission of the evidence error even in the absence of any finding of bad faith. *Coleco Industries, Inc. v. Berman, supra,* 567 F.2d at 576 n.14.

The rationale is consistent with other decisions where preclusion did not rest upon bad faith: *Tabatchnick v. Searle & Co.*, 67 F.R.D. 49, 56-57 (D.N.J. 1975); *Case v. Abrams*, 352 F.2d 193, 196 (10th Cir. 1965); *Ely v. Reading Company, supra; Globe Cereal Mills v. Scrivener*, 240 F.2d 330, 335 (10th Cir. 1956); *Moore v. Sylvania Electric Products, Inc.*, 454 F.2d 81, 84 (3d Cir. 1972); *Payne v. S. S. Nabob*, 302 F.2d 803, 807 (3d Cir.), *cert. denied*, 371 U.S. 870 (1962); *Rodrigues v. Ripley Industries, Inc.*, 507 F.2d 782, 786-87 (1st Cir. 1974); *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977) (error to accept testimony of an expert where he had substantially changed his opinion since his deposition and there was no disclosure of the change).

B. The Decision Below Properly Gives Effect This Court's Policies Regarding the Discoverability, Disclosure and Admissibility of Expert Opinion Evidence.

The petition makes no reference to either Rules 703 and 705, Fed. R. Evid. or to Rules 26(b)(4)(A)(i) and 26(e)(1)(B), Fed. R. Civ. P., but the relationship of these Rules to the unfairness of the trial formed an important basis for the Tenth Circuit's conclusion of abuse of discretion. These Rules also necessarily impact upon the interpretation of pretrial orders by trial courts in making decisions as to the admission or preclusion of evidence.

The petition does not directly challenge the appellate court's insistence upon compliance with the policies underlying these Rules, but instead chooses to characterize them as "insubstantial procedural requirements." (Questions Presented; 1 and 2, Pet., p. (1)).

We submit that none of the following factors are "insubstantial:"

1. Smith's failure to answer, as to Dr. Freston, Ford's interrogatories propounded under Rule 26(b)(4)(A)(i), Fed. R. Civ. P.

2. Smith's failure to supplement, as to Dr. Freston, it's answers to interrogatories as required by Rule 26(e)(1)(B), Fed. R. Civ. P.

3. The submission, as to Dr. Freston, of an incomplete and misleading summary of his expert testimony, in violation of the pretrial order.

4. The reliance, by Dr. Freston, upon the article by Garrett & Braunstein, an article of which Ford had no prior knowledge and which did not meet the requirements of Rule 703, Fed. R. Evid., as it was not the type of article relied upon in his specialty as a treating physician.

5. The lack of Ford's pretrial knowledge of Dr. Freston's undisclosed opinions as to causation and defectiveness and the alleged underlying basis for those opinions (which did not in fact support his opinion) prevented Ford's effective cross-examination and frustrated the principle of predisclosure underlying Rule 705, Fed. R. Evid.

The opinion below correctly concluded that the combined effect of these factors was to deprive Ford of a fair trial; the trial court's receipt of Dr. Freston's non-cumulative, crucial expert opinion as to causation and defectiveness was an abuse of discretion.

II.

The Petition Presents No Conflict Either as to the Appropriate Scope of Appellate Review for Abuse of Discretion or as to the Substance of Pretrial Procedures.

A. The "Substitution of Discretion" Conflict

Buried in his "Statement of the Case" (Pet., p. 5), but appearing nowhere in the argument, Smith asserts that the opinion below conflicts with this Court's decision in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962), and with *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976) and *Davis v. Duplantis*, 448 F.2d 918 (5th Cir. 1971).

The "conflict" argument is premised wholly upon petitioner's erroneous assertion that the Tenth Circuit found no abuse of discretion. No fair reading of the opinion below can support this premise.

At its outset the opinion notes:

> "Ford strenuously asserts that the trial court abused its discretion in allowing Dr. James W. Freston to testify, over objection, that Smith's internal injuries

were significantly enhanced as a proximate result of the unreasonably dangerous passenger restraint system employed in the Fox vehicle." (App. A, 3a)

The opinion later recognizes the "wide discretion" of the district courts in handling discovery and pretrial matters, noting that

> ". . . reversible error has been found in allowing testimony without such discovery where there has been a 'gross abuse of discretion resulting in fundamental unfairness in the trial of the case.' [citations omitted]." (App. A, 18a)

The court below describes "a series of factors which should be considered in determining whether a district court has abused its discretion in . . . allowing testimony not specified in the pretrial order." (App. A, 23a). The court then spends the next six pages of its opinion discussing these factors in detail, applying them to the proceedings in this case, and concludes:

> "Balancing these factors against the wide discretion accorded the district court in both the discovery and pretrial area, we hold that Ford suffered such prejudice as requires the case to be reversed and remanded for new trial." (App. A, 29a)

The opinion below found the required abuse of discretion; the court did not, as petitioner asserts, "substitute" its discretion for that of the district judge (Pet. pp. 3, 5 and 16).

Resting as it does upon a finding of abuse of discretion the opinion below does not present the conflict asserted by Smith.

In *Link, supra,* this Court upheld the trial court's power to dismiss a case for failure to prosecute and upheld the trial court's discretionary, *sua sponte* exercise of that power without notice or hearing. In *Link* this Court looked for abuse and found none; the opinion below reaches a dif-

ferent result, but presents no conflict in terms of the proper scope of appellate review. For the same reason there is no conflict with *Davis v. Duplantis, supra,* where the expert's *full* report was delivered seven days before trial, the opponent chose not to depose and the trial court's acceptance of the expert testimony was upheld on appeal. Indeed, as reflected in Section I, *supra,* the factors applied by the court below in determining whether there was an abuse of discretion are entirely consistent with those employed by the other Circuit Courts of Appeal.

B. The "Mini Trials" Conflict.

Smith argues that the *result* of the opinion below is that pretrial conferences will of necessity be elaborate and time-consuming "mini trials." Contrary to Smith's assertion, the Tenth Circuit here did not "eliminate" the district court's pretrial procedure, nor did it mandate "a pretrial procedure that is elaborate, detailed and complex." (Pet. p. 8). Rather the opinion below simply *enforces* the district court's own procedures in a manner consistent with both the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Recall that Dr. Freston's expert opinions on causation and defectiveness would have been properly admitted had Smith done *any* one of the following:

1. Answered Ford's interrogatory 23 as to Dr. Freston.[2] The substance of that interrogatory is explicitly authorized by Rule 26(b)(4)(A)(i), Fed R. Civ. P.

---

[2] "23. For each expert witness, including physicians, which you may call at the trial of this matter, state:

(a) His name and address;

(b) A brief description of his testimony;

(c) Any opinions which he may be called upon to give;

(d) The facts upon which he will base such opinions." (App. A, 4a).

2. Supplemented his response to Ford's interrogatories as required by Rule 26(e)(1)(B);

> "A party is under a *duty* seasonably to supplement his response with respect to any question directly addressed to . . . (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony." [emphasis added].

3. Included in his Supplemental Pretrial Submission as to Dr. Freston one additional sentence:

> "Dr. Freston will also testify as to his opinions as to the casual relationship between plaintiff's internal injuries and the defectiveness of the seat belt."

None of the foregoing curative actions resembles the kind of truly complex and counterproductive pretrial procedures struck down in *McCargo v. Hedrick, supra.*

The other cases relied upon by Smith (Pet. p. 9) reveal no conflict with the opinion below. In *Padovani v. Bruchhausen,* 293 F.2d 546 (2d Cir. 1961), the court overturned as an abuse of discretion a sweeping preclusion order directed to exhibits and testimony for failure to comply with the requirements of a pretrial procedure which required particulization of legal theories and other matters unauthorized by and in contravention of Rule 16, Fed. R. Civ. P. The preclusion order was too harsh a sanction and the pretrial procedure unduly burdensome. In *Silas v. Sears, Roebuck & Co., Inc.,* 586 F.2d 382 (5th Cir. 1978), the trial court had dismissed plaintiff's lawsuit with prejudice as a sanction for his attorney's failure to prepare for and appear at a pretrial conference. The dismissal was reversed on appeal; the sanction was an abuse

of discretion and too harsh where there was no record of prior delays or contumacious conduct, and no prejudice to the defendant. In *Identiseal Corp. of Wisconsin v. Positive Identification Systems, Inc.,* 560 F.2d 298 (7th Cir. 1977), the trial court was held to have abused its discretion by first entering a pretrial order which required the plaintiff to undertake discovery, and then dismissing the suit when plaintiff refused to undertake the discovery and failed to file a new pretrial report which was to reflect that discovery. The holding was based on the trial court's lack of power to require the undertaking of discovery over a party's objection. Finally, in *Edgar v. Slaughter,* 548 F.2d 770 (8th Cir. 1977), the trial court's dismissal of a complaint for failure to answer interrogatories was held an abuse of discretion. The court declared that dismissal was appropriate only where the client's failure to comply was willful or in bad faith. The court noted the need to balance the conflicting policies of the need to prevent delay against the strong policy favoring deciding cases on their merits.

The foregoing cases demonstrate: (1) that where a pretrial procedure is too complex or burdensome it may be struck down as an abuse of discretion or as unauthorized by Rule 16, Fed. R. Civ. P.; (2) that the sanction of dismissal for failure to comply with improper pretrial requirements or even for the failure to comply with discovery under Rule 37, Fed. R. Civ. P. may be overturned as an abuse of discretion where there has been no willfulness or bad faith, no particular prejudice to the adversary or where lesser sanctions would have sufficed.

The relationship between these cases and the decision below is remote at best. In any event they present no conflict with this case. Indeed, here Ford was effectively prevented from trying the case on the merits; if anything our case is thus philosophically consistent with *Padovani, Silas* and *Edgar.*

Smith's argument obscures the fact that, whether intentional or negligent, the submission as to Dr. Freston was incomplete and misleading. Rather than accepting the responsibility for his own acts and omissions, petitioner contrives to place the responsibility on the Court of Appeals, fabricating a "mini trial" requirement that does not exist.

III.

Any "Justice Delayed" In This Case Is As Attributable To Petitioner As It Is To The Judicial System

A. Chronology of Events.

The accident took place on January 20, 1973. *Three and one-half years later,* Smith filed his complaint, on July 30, 1976. The trial commenced on March 29, 1978, some nineteen months later. The verdict came on April 11, 1978; judgment entered on April 12; post-trial motions were filed and heard on April 24; the Order denying those motions was entered on June 19, and the Notice of Appeal was filed on July 18, 1978.

In the Court of Appeals, due to interim extensions requested by each party and not objected to by the other, Ford's final brief was submitted on April 25, 1979, some nine months after the filing of the Notice of Appeal. It thus took some 4½ months longer to the appellant's reply brief than the minimum time schedule reflected in the Federal Rules of Appellate Procedure. Oral argument was presented nine months later, on January 24, 1980. Less than five months after oral argument the court announced its decision on July 17, 1980.

On July 31, 1980, Smith filed a petition for rehearing and suggestion of rehearing en banc, which was denied on September 16, 1980. The Petition For Certiorari then followed on December 12, 1980. At Smith's request, the retrial

of the case, which had been set to commence on January 12, 1981, was vacated on November 20, 1980 upon Smith's statement that he intended to seek a writ of certiorari.

B. The Appellate Court Expeditiously Considered and Decided This Case.

Smith's product liability case is complex; it took ten days to try and the record on appeal in the Tenth Circuit was 2,264 pages including exhibits. In its appeal to the Tenth Circuit Ford presented a total of eight issues for review, only one of which related to the inadequacy of the pretrial summary of Dr. Freston's testimony.

The chronology of events shows that despite the complexity of the case and the length of the record, the appellate court required only fourteen months from final briefing to decision.

In the face of this expeditious treatment, and in the face of the fact that he waited three and one-half years to *file* his case, Smith makes the rather extraordinary argument here that (1) he has a constitutional right to "speedy justice" which (2) was violated by the appellate court taking fourteen months to decide the case. (Pet. pp. 6-7).

Petitioner then seeks to invoke this Court's supervisory powers, suggesting that the Court formulate guidelines which apparently would limit the times within which any case must be decided in the trial court and on appeal. Apparently implicated within Smith's request would be the elimination of appellate review for abuse of discretion, as well as a reversion to trial by surprise.

C. Smith's Presentation Here Would Be Insufficient To Support A Criminal Defendant's Assertion Of A Denial Of A Speedy Trial

Cases examining a criminal defendant's federal right to a speedy *trial* under the Sixth Amendment have generally held that the right does not extend to a speedy *appeal; Doescher v. Estelle,* 454 Supp. 943 (N.D. Tex.), *ap-*

peal dismissed, 597 F.2d 281 (5th Cir. 1978) (15½ month delay in processing appeal before Texas Court of Appeals not an unjustified delay); *State v. Lagerquist*, 176 S.E.2d 141 (S.C.), *cert. denied*, 401 U.S. 937 (1970). Similarly, delays incident to appeals do not prevent the retrial of the defendant. *United States v. Mills*, 434 F.2d 266 (8th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971). The same rule applies where the appeal relates to the indictment or plea, resulting in a delay of the intial trial. *Dandridge v. United States*, 265 F.2d 349 (D.C. Cir. 1959); *United States v. Auerbach*, 420 F.2d 921 (5th Cir. 1969), *reh. denied*, 423 F.2d 676, *cert. denied*, 399 U.S. 905 (1970). The rule is the same under the Speedy Trial Act, 18 U.S.C. § 1361(h)(1)(E); *United States v. Martin*, 587 F.2d 31 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1222 (1979). That Act does not purport to establish time frames within which an *appeal* is decided.

At no time during the trial or appellate proceedings below did Smith either complain of delay or seek any acceleration in the judicial process. His awakening to the alleged violation of his "right" conveniently occurred only after the adverse decision by the Court of Appeals. Clearly Smith has waived whatever right he here seeks to assert for the first time. *Barker v. Wingo*, 407 U.S. 514 (1972).

Finally, Smith has shown no prejudice from the alleged "delay." The petition speaks only in conclusory terms (Pet. 6,7) and cites not a single fact in support of Smith's alleged inability to prosecute his case upon retrial. We submit that there are none. Prejudice will not be inferred from the mere passage of time; some further showing must be made. *Barker v. Wingo, supra.*

Therefore, laying aside the total chaos which would result from a declaration of a right to a speedy civil trial, and the obvious conflicts such a right would present with the Speedy Trial Act, this case presents no occasion for the

drastic action sought by petitioner. Speedy justice has not been denied here; by analogy the presentation here would fail under either the Sixth Amendment or the Speedy Trial Act.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

January 27, 1981.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

JOHN H. SMITH, *Plaintiff-Appellee*,

v.

FORD MOTOR COMPANY, *Defendant-Appellant*.

No. 78-1636

United States Court of Appeals,
Tenth Circuit.

Argued January 24, 1980.

Decided July 17, 1980.

Rehearing Denied September 16, 1980.

Edward P. Moriarity of Spence, Moriarity & Schuster, Jackson, Wyo. (G. L. Spence and Robert P. Schuster of Spence, Moriarity & Schuster, Jackson, Wyo., and John R. Hursh, Central Wyoming Law Associates, Riverton, Wyo., with him on the brief), for plaintiff-appellee.

Gordon G. Greiner of Holland & Hart, Denver, Colo. (G. G. Greenlee of Murane & Bostwick, Casper, Wyo. with him on the brief), for defendant-appellant.

Before BARRETT, DOYLE and SEYMOUR, Circuit Judges.

BARRETT, Circuit Judge.

The basic controversy in this case has been previously before this Court, and our opinion is reported in *Fox v. Ford Motor Company*, 575 F.2d 774 (10th Cir. 1978). Both the prior case and the present one arose from an automobile collision which occurred on January 29, 1973. The plaintiff, John H. Smith, was riding as a front-seat passenger in a 1970 Ford, four-door Thunderbird. Driving in the car in which the plaintiff was riding was Mr. Fox, who was a plaintiff in the prior case, and who obtained a judgment for a loss as a result of the death of his wife. Their wives were passengers in the back seat of this car and both were killed.

John H. Smith, plaintiff herein, filed this action on July 30, 1976. He alleged that he suffered personal injuries as a result of defective safety belts and seats; that the defective conditions were the result of negligence in the design, installation, construction, inspection and testing of the seat belts, the seat tracks, dashboard and windshield. There were claims which alleged strict liability and breach of warranty as well.

The January 29 headon collision resulted from a pickup truck crossing the center line into the plaintiff's lane on the opposite side of the highway. The Smiths and the Foxes had been driving in an opposite direction and so the almost headon impact was a heavy one. Even though neither vehicle was moving at high speeds, the vehicular damage and the personal injuries were of great magnitude. The approximate speed of each vehicle was 25 to 45 miles per hour just before the impact.

The main action against Ford is based upon the alleged negligent design of the seats and the seat belts, together with the subsequent negligence in failing to correct some of these conditions after having discovered the defects. All of the passengers wore lap seat belts. The Messrs. Fox and Smith had shoulder belts available, but they were not using them. Smith's injuries were more severe than those of Fox. There is, of course, no contention that any defect in the vehicle itself caused the headon collision. The contention is that the injuries of Smith were greatly aggravated due to the defects in design of the lap belt and the manner in which it was anchored so that it could not protect passengers in a heavy impact.

Plaintiff Smith, whose case is before us, incurred very serious permanent internal injuries. Included were injuries to his spleen and pancreas, as well as to his intestines and face. The spleen had to be removed as a result of the injuries incurred, and subsequently a pancreatic condition developed. Smith's complaint was that he had suffered a

great amount of pain and would suffer future consequences which allegedly included impairment of his eating ability, diarrhea, possible diabetes and future surgery from the pancreatitis. Also alleged was the risk of blindness, stroke, cancer, heart disease, impotency and amputation. From the removal of the spleen it was alleged that phlebitis, pneumonia, clotting, pulmonary infarctions and susceptibility to infection had occurred.

The cause was tried to a jury, and following a 10-day trial, a verdict in the amount of $800,000 was returned. Ford seeks review and reversal of the judgment based upon this verdict. Motions for judgment notwithstanding the verdict, for new trial, and remittitur were filed and denied. Various issues are raised on appeal. However, our determination that the District Court erred in receiving the testimony of a crucial expert witness is dispositive.

I.

Ford strenuously asserts that the District Court abused its discretion in allowing Dr. James W. Freston to testify, over objection, that Smith's internal injuries were significantly enhanced as a proximate result of the unreasonably dangerous passenger restraint system employed in the Fox vehicle. Ford contends that Smith's failure to disclose the substance of such testimony (1) violated the Court's pretrial order; (2) violated Smith's duty to provide supplemental responses to interrogatories pursuant to Rule 26(e), Fed. Rules Civ. Proc., 28 U.S.C.A.; and, (3) prejudiced Ford's ability to counter such evidence.

As noted earlier, Smith's theory of liability was tied to Ford's alleged breach of its duty to "design and construct automobiles in a reasonable and prudent manner so that failures of the parts of the automobile will not cause [enhanced personal] injuries to the occupants when a collision occurs." *Chrysler Corp. v. Todorovich,* 580 P.2d 1123, 1129-1130 (Wyo.1978). Proof of liability under such a

theory requires the plaintiff to establish that the defective nature of the passenger restraint system proximately caused "damage or injury . . . over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defect design." *Larsen v. General Motors Corp.*, 391 F.2d 495, 503 (8th Cir. 1968); *Fox v. Ford Motor Co., supra.* Almost invariably, such proof entails the presentation of expert testimony. *See Randolph v. Collectramatic, Inc.*, 590 F.2d 844 (10th Cir. 1979).

Pretrial Background

During the discovery phase of the case, Ford propounded a series of interrogatories requesting, among other things, the following information:

> 23. For each expert witness, including physicians, which you may call at the trial of this matter, state:
>
> (a) His name and address;
>
> (b) A brief description of his testimony;
>
> (c) Any opinions which he may be called upon to give;
>
> (d) The facts upon which he will base such opinions.
>
> [R., Vol. I, p. 13].

In response, plaintiff identified Dr. Brohm, Dr. Ferris, Dr. Gullickson, Dr. Axthelm and Professor Crawford as expert witnesses, described the opinions of each and set forth the basis for those opinions. In addition, Smith responded:

> As the case develops, and detailed examination continues, further testimony may be required and the essence of same will be provided as required by the Rules of Civil Procedure.
>
> [R., Vol. I, p. 19].

Plaintiff did indeed supplement this interrogatory with additional information about Professor Crawford, but failed at any time to mention Dr. Freston.

The first notice of plaintiff's intention to call Dr. Freston as an expert witness at trial occurred on January 24, 1978—less than two and one-half months before trial. Plaintiff's supplemental pretrial submission, filed that date, contained the following:

> The Plaintiff, as of the date of the Supplemental Pretrial Submission, intends to call the following witnesses:
>
> * * * * * *
>
> 8. Dr. Freston, University Hospital, Salt Lake City, Utah, will testify as to his medical treatment of the Plaintiff, as well as to his prognosis.
>
> [App., Vol. I, pp. 71-72].

This identification was in response to an earlier court order that "the parties may call additional witnesses . . . on the condition that at least five (5) days prior to the supplemental pretrial conference they furnish opposing counsel with the names and addresses of the additional witnesses, together with a brief summary of the testimony they are expected to give." [App., Vol. I, p. 61].

At the supplemental pretrial conference, held January 27, 1978, the parties were given until March 6, 1978, to designate additional witnesses expected to be called at trial. Although plaintiff earlier anticipated no need to call additional witnesses [App., Vol. I, p. 72], he subsequently designated fourteen other witnesses for use at trial. [App., Vol. I, pp. 114-116]. Among these witnesses were Drs. Volk and Gainsford of Salt Lake City, Utah, "listed in the medical records of the plaintiff [who] may be called to testify as to the role they played in the care and treatment of the plaintiff." [App., Vol. I, p. 114]. Ford also designated three additional witnesses. Both parties' motions to strike the testi-

mony of certain of the recently named individuals on the grounds of inadequate time to conduct discovery prior to trial were denied by the Court on March 15, 1978. [App., Vol. I, p. 136]. Ford did not move to strike the testimony of Drs. Volk and Gainsford.

Ford earlier deposed several other doctors designated by Smith as experts likely to be called at trial — including Drs. Brohm and Gullickson. Both of these physicians were designated in plaintiff's supplemental pretrial submission as experts who would testify about medical care given to the plaintiff, as well as his prognosis. Each of these witnesses was specifically asked in deposition whether he had any opinion regarding the relationship of plaintiff's injuries and the alleged deficient design or manufacture of the automobile. Each was also asked whether he had made a study of the seat belt syndrome or read any literature in the area. Each replied in the negative to these questions. [Gullickson dep., R., Vol. XVIII, pp. 21-22; Brohm dep., R., Vol. XXI, pp. 12-15]. Dr. Freston was not deposed.

Trial Background

On March 29, 1978, plaintiff called his first witness, Dr. James W. Freston. Freston testified that he was currently employed as a Professor of Medicine and Clinical Pharmacology, and as Chairman of the Department of Gastroenterology at the University of Utah. Dr. Freston holds both an M.D. and Ph.D. in medicine, and has compiled a list of impressive credentials, including the authorship of some sixty-two articles in his field. At one point in his testimony, he described himself as a "specialist's specialist" in the area of gastroenterology.

Early in his testimony, Dr. Freston reviewed, in detail, the history of plaintiff's injuries and subsequent medical treatment using various visual aids. From this, the doctor moved to specifically deal with the injuries to Smith's pancreas, which he identified as resulting from the automobile

accident, [App., Vol. I, pp. 245,260-261] as well as his prognosis. No defense objection was interposed as to Dr. Freston's opinion that the injuries complained of arose out of the collision between the two vehicles. Objections were interposed, however, when plaintiff's counsel attempted to elicit testimony establishing the existence of conditions consistent with seat belt injuries.

A hearing on the objections was held in chambers. Counsel for Ford claimed prejudicial surprise at Smith's attempt to elicit testimony establishing proximate causation between the lap belts employed and nature of the injuries — an area Ford claimed was clearly outside the scope of plaintiff's description of Dr. Freston's proposed testimony.[1] The Court ruled that the testimony sought was proper on three grounds: (1) that the custom of Wyoming practice has been to describe in extremely narrow terms the substance of proposed witnesses' testimony prior to trial; (2) that the claim of surprise was unjustified because "we have gone into this question as to the causal condition with doctors always." [App., Vol. II, p. 267]; and, (3) that Ford's failure to object to Dr. Freston's testimony that the injury resulted from the accident waived its right to object as to relationship between those injuries and the lap belts employed.

The continuation of plaintiff's direct examination of Dr. Freston crystalized the connection between Smith's intra-abdominal injuries and the passenger restraint system. Dr. Freston stated that his examination of over one hundred intra-abdominal injuries which occurred during traffic accidents, some showing physical evidence of seat-belt injury, formed the basis for his opinion that bruises or injury high in the abdomen, such as to the pancreas, result from seat belts which fail to properly function. Where bruises are localized in the hip area, this evidences seat belts which are

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[1] The colloquy itself is enlightening and we feel sharpens the issues involved. Its length, however, requires that we frame it in the form of an appendix to this opinion.

non-defective. With specific reference to Smith's injuries, Dr. Freston testified:

> Q [Mr. Spence] All right. Now, when you find an injury as high as the pancreas, what does that mean to you?
>
> A [Dr. Freston] Well, something unusual has happened; something out of the ordinary.
>
> Q With respect to the functioning of the seat belt?
>
> A Yes.
>
> * * * * * *
>
> Q What do you find in that regard?
>
> A I find that if the seat belt isn't functioning properly and is over the abdomen rather than over the hips, the injuries tend to occur higher. And we start to see rupture of the spleen and we start to see injuries to the pancreas.
>
> * * * * * *
>
> Q Do you have an opinion based upon reasonable medical probability as to the causal — as to what caused the injuries [to the] spleen and to the pancreas in the case at ha ıd?
>
> MR. GREENLEE: [objection]
>
> THE COURT: [overruled]
>
> A Yes, I have an opinion.
>
> Q (By Mr. Spence) Would you state to the jury what your opinion is?
>
> A Yes. *My opinion is that the probability is overwhelming that the injury to the pancreas resulted from the the automobile accident.*

And specifically, the evidence is good that the seat belt was involved in that injury.

And if I may – I'm sensitive to Mr. Greenlee's objection – we are quite capable of diagnosing events today that started five years ago. That's a matter of routine in medicine.

Q Thank you very much. Now, I want to ask you another question. There has been a contention made in this case that the injuries in this case were a result of upward pressure of [t]he organs in the accident, which upward pressure of the organs internally for those organs on other organs and caused the injury to the spleen and to the pancreas.

Do you have an opinion based upon reasonable medical certainty as to that contention?

A Yes.

Q Would you tell the jury what it is and the basis for your opinion?

MR. GREENLEE: [objection]

THE COURT: [overruled]

A Well, my opinion is that it's highly improbable . . .

[App., Vol. II, pp. 272-276]. [Emphasis supplied].

This testimony was presented in a graphic, persuasive manner. Following the statement of his opinion, Dr. Freston punctuated his point with empirical studies[2] and the use of a mannequin showing the various intra-abdominal organs.

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[2] *Garrett and Braunstein, The Seat Belt Syndrome,* delivered before the Twenty-First Annual Session of the American Association for the Surgery of Trauma, Chicago, Illinois, September 28-30, 1961. [Hereinafter cited as *Garrett and Braunstein*]. A reprint of the study is available through the Highway Safety Research Institute at the University of Michigan, Ann Arbor, Michigan.

At the completion of Dr. Freston's direct examination, counsel for Ford was granted a ten minute recess to prepare for his cross-examination of the witness.[3] Ford did briefly cross-examine Dr. Freston concerning the seat belt syndrome.

After Dr. Freston was excused as a witness, Ford requested plaintiff's counsel to provide him with a copy of *Garrett and Braunstein*. Following plaintiff's refusal, the District Court ordered production. [App., Vol. II, pp. 316-321].[4]

Smith also produced evidence showing the motion and stress areas of the human body in relation to passenger restraint systems such as that employed here at the time of collision. Such testimony, however, dealt exclusively with the engineering and physics aspects of the collision forces. It did not relate those movements to medical injury.[5]

Ford's expert witness, Donald F. Huelke—a professor at the University of Michigan Medical School, and a recognized authority in the field of automotive injury—refuted in large part Dr. Freston's causation testimony, specifically addressing Dr. Freston's interpretation of the *Garrett and Braunstein* study.

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[3] The recess was granted at 4:43 p.m. and trial resumed at 4:54 p.m. Dr. Freston was scheduled to leave Casper, Wyoming, at 9:15 a.m. the next morning.

[4] Ford asserts that "[d]espite the Court order, plaintiff's counsel never produced the article." [Brief of Appellant at p.35, n. 2]. Inasmuch as Smith has not expressly conceded this statement, we cannot consider it in deciding whether prejudicial error occurred. *See Braden v. University of Pittsburg*, 477 F.2d 1, 6 (3d Cir. 1973.)

[5] This testimony was presented primarily through Professor Richard H. Crawford, who specifically acknowledged that he was not qualified to discuss the relationship between the load forces and the injury from a medical standpoint.

A.

The Interface Between Pretrial Discovery and the Presentation of Expert Testimony

Traditionally, the presentation of expert testimony involving opinion evidence required the establishment of certain foundational facts prior to the expression of the opinion. *See*, J. Wigmore, Evidence § 672, at pp. 792-793 (3d Ed. 1940). The use of hypothetical questions provided the normal vehicle for the elicitation of such evidence. Although this Court treated the foundational requirements for opinion evidence liberally, *United States v. Sessin*, 84 F.2d 667 (10th Cir. 1936), *New York Life Ins. Co. v. Doerksen*, 75 F.2d 96 (10th Cir. 1935), other courts strictly enforced the requirements. *Harris v. Smith*, 372 F.2d 806 (8th Cir. 1967); *Kale v. Douthitt*, 274 F.2d 476 (4th Cir. 1960). In *Kale v. Douthitt*, *supra*, at p. 482, the Court stated:

> Generally, a hypothetical question must assume all facts disclosed by the evidence material to the theory of the case as viewed from the side propounding the question. A question which assumes any material fact not supported by the evidence is inadmissible. A question which omits any material fact essential to the formation of a rational opinion is likewise incompetent. The facts upon which the expert bases his opinion or conclusion must permit reasonably accurate conclusions as distinguished from mere guess or conjecture. 20 Am. Jur., Evidence, §§ 788, et seq.

The inherent problems in forcing the propounding party to supply such "material" facts often led to awkward results. For example, in *United States v. Sessin, supra,* at p. 669 the following issue arose:

> A hypothetical question was propounded to a physician, upon the basis of which the witness was asked for his opinion as to the bodily ailments which

> afflicted plaintiff on January 1, 1919, as to the prognosis thereof, and as to whether one so afflicted was physically incapacitated to work. *The question took half an hour to propound; it was necessarily long because plaintiff's medical history was long.* It was objected that a few of the multitudinous statements of the hypothesis lacked meticulous accuracy. Two supposedly defective statements are pressed as grounds for reversal. One is that the question assumed that the wound had been cleaned out once a year. The proof was that there were twenty-three such operations over a period of seventeen years, and that plaintiff did not remember the date of the last operation although it was a good many years after he left the hospital. The other defect is that the hypothesis referred to an abscess in the abdomen as tubercular. That there was an abdominal abscess is not disputed; the proof showed a tuberculosis of the lung and leg bone at the time. No other cause for the abdominal abscess being shown, it is not an unfair inference that it was tubercular, occurring as it did between two foci of tubercular infection. [Emphasis supplied].

Although we there affirmed the trial court's decision admitting the opinion evidence, the practical difficulties are illustrated.

At the same time, the heavy burden placed on the examiner to articulate foundational facts under the hypothetical question rule, often resulted in a denial of pretrial discovery to the cross-examiner concerning the expert and his proposed testimony. Prior to the enactment of the 1970 amendments to the Federal Rules of Civil Procedure, 28 U.S.C.A., no provision was made in the Federal Rules with respect to the discovery of experts or the nature of their information. Judicial treatment of the issues surrounding the discovery of such information varied, with the result that most pre-1970 decisions denied discovery in its

entirety or limited it to extremely narrow areas. *See, Long, Discovery and Experts Under the Federal Rules of Civil Procedure,* 38 F.R.D. 111, at p. 112 (1965); *Winner, Procedural Methods to Attain Discovery,* 28 F.R.D. 97 (1960). Some of the earlier cases treated experts as agents of the attorney under the attorney-client privilege and denied discovery on that basis. *See, e. g., Schuyler v. United Airlines, Inc.,* 10 F.R.D. 111 (M.D.Pa.1950); *Cold Metal Process Co. v. Aluminum Co.,* 7 F.R.D. 684 (D.Mass.1947). A second approach, patterned after the qualified work product privilege developed in *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), immunized discovery unless the opponent could show a substantial, particularized need for the information. *See, Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp.,* 23 F.R.D. 257 (D.Neb.1959). Other courts refused discovery simply on the basis of the expert's status. *See, e. g., American Oil Co. v. Pennsylvania Petroleumn Products Co.,* 23 F.R.D. 680 (D.R.I. 1959) Still other opinions developed a doctrine of "unfairness" holding discovery unavailable if the result was that one party would be taking unreasonable advantage of an opponent's diligence or financial resources in obtaining expert testimony. *See, e.g., United States v. 23.76 Acres of Land,* 32 F.R.D. 593 (D.Md.1963).

The drafters of the 1970 amendments to the Federal Rules of Civil Procedure sought to resolve this inharmonious state of affairs by providing a uniform, orderly scheme of discovery. That scheme of discovery is now embodied in Fed.Rules Civ.Proc., rule 26, 28 U.S.C.A. [hereinafter cited as rule 26]. Rule 26 liberalized discovery, adopting the doctrine of "unfairness" as its guide. Under rule 26(b)(4)(A)(i),

> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and *to state the substance of the*

facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.
[Emphasis supplied].

The Advisory Committee on Civil Rules, which promulgated the original draft, published an accompanying text explaining the intent of the drafters and the basis for the new provisions:

In cases of this character [involving expert testimony], a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, Some Practical Problems in Proof of Economic, Scientific, and Technical Facts, 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is "lengthy—and often fruitless—cross-examination during trial," and recommends pretrial exchange of such material. Calif. Law. Rev. Comm'n Discovery in Eminent Domain Proceedings 707-710 (Jan.1963). *Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.*

> Advisory Committee Notes, rule 26, Fed. Rules Civ. Proc., 28 U.S.C.A. [Emphasis supplied].

This liberalization in the discovery area also resulted in liberalization in other areas. The increased availability of discovery concerning expert witnesses and the facts upon which they based their opinions, prompted reexamination of the hypothetical question requirement and other traditional foundational basis that were necessary prior to the introduction of opinion evidence. Criticism surrounding these areas mounted:

> The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 426-427 (1952). Advisory Committee Notes, rule 705, Fed. Rules Evid., 28 U.S.C.A.
>
> * * * * * *
>
> [I]t is a failure in practice and an obstruction to the administration of justice. If we require that it recite all the relevant facts, it becomes intolerably wordy. If we allow, as most courts do, the interrogating counsel to select such of the material facts as he sees fit, we tempt him to shape a one-sided hypothesis. [Footnotes omitted]. C. McCormick, Evidence § 16 at p. 36 (2d ed. E. Cleary 1972).

It was in response to this criticism that Federal Rules of Evidence 703 and 705, 28 U.S.C.A. were enacted. Rule 705, eliminating the need for hypothetical questions, allows an expert witness to "testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise." Cross-examination may, however, be used to ferret out such underlying facts. Rule 703 specifies that the underlying facts or data need not be admissible in evidence if "of a type reasonably relied upon by experts

in the particular field in forming opinions or inferences upon the subject." *See also: Bryan v. John Bean Division of FMC Corp.*, 566 F.2d 541 (5th Cir. 1978). The combined effect of these new rules is to "place the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination. As stated in the Advisory Committee Note to Rule 705, and highlighted by the elimination of the foundation often provided by the hypothetical question, 'advance knowledge through pretrial discovery of an expert witness's basis for his opinion is essential for effective cross-examination.' " *Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U.Ill.L.F. 895, 897 [hereinafter cited as *Graham, Part One*].

The Advisory Committee on the proposed Federal Rules of Evidence, recognizing the need for such pretrial disclosure, considered the provisions of rule 26, Fed.Rules Civ.Proc., 28 U.S.C.A. sufficient:

> If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. *The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts.* Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan.L.Rev. 455 (1962).

Advisory Committee Notes, rule 705, Fed. Rules Evid., 28 U.S.C.A. [Emphasis supplied].

Professor Friedenthal has also recognized the critical nature of such pretrial discovery:

> *It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, particularly when expert witnesses are involved.* Unlike two eye-witnesses who disagree, two experts who disagree are not necessarily basing their testimony on their views of the same objective features. Instead they may rely on entirely separate data, since the theoretical basis underlying their respective approaches may differ radically. *Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony.* He may need advice of his own experts to do so and indeed, in certain cases, his experts might require time to make further inspections and analyses of their own.
>
> The need for pretrial discovery regarding expert witnesses is further evidenced by the ever-increasing dissatisfaction with the honesty and reliability of expert testimony. . . .
>
> *Friedenthal, Discovery and Use of an Adverse Party's Expert Information,* 14 Stan.L.Rev. 455, 485 (1962) [Footnote omitted]. [Emphasis supplied].

This liberalization is further illustrated by the provisions of rule 26(e), Fed.Rules Civ.Proc., 28 U.S.C.A. Under rule 26(e) a party is under a duty to seasonably supplement his response only in three situations, one of which includes information concerning "the identity of each person ex-

pected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony."

The failure of a party to comply with discovery requests under rule 26 has led to findings of prejudice resulting in the exclusion of proffered evidence. *Coleco Indusrties, Inc. v. Berman,* 567 F.2d 569 (3d Cir. 1977), *cert. denied,* 439 U.S. 830, 99 S.Ct. 106, 58 L.Ed.2d 124 (1978); *Tabatchnick v. G. D. Searle & Co.,* 67 F.R.D. 49 (D.N.J.-1975). Similarly, although district courts enjoy wide discretion in handling discovery and pretrial matters, *Phil Crowley Steel Corp. v. Macomber, Inc.* 601 F.2d 342 (8th Cir. 1979), reversible error has been found in allowing testimony without such discovery where there has been a "gross abuse of discretion resulting in fundamental unfairness in the trial of the case." *Voegeli v. Lewis,* 568 F.2d 89, 96 (8th Cir. 1977); *Shelak v. White Motor Co.,* 581 F.2d 1155 (5th Cir. 1978; *Weiss v. Chrysler Motors Corp.,* 515 F.2d 449 (2d Cir. 1975).

B.

The Pretrial Order

We have previously observed that Smith failed to provide any information, in the form of interrogatory responses, about Dr. Freston or his proposed testimony as required by rule 26(e), Fed.Rules Civ. Proc., 28 U.S.C.A. This duty to provide responses concerning expert witnesses continues through trial. *Weiss v. Chrysler Motors Corporation, supra.* If we were faced solely with the plaintiff's failure to provide such information, we would be compelled to reverse the District Court's admission of such evidence. *Weiss v. Chrysler Motors Corporation, supra.*

Smith contends, however, that his duty to supplement was fulfilled by the description of Dr. Freston's proposed testimony provided in his supplemental pretrial submission.

Smith asserts that this, combined with the alleged Wyoming custom and practice of allowing treating physicians to testify concerning causation of injuries militates against any finding of prejudice to Ford. Any surprise which may have occurred, argues Smith, was avoidable, had Ford simply taken the deposition of Dr. Freston.

Rule 16, Fed.Rules Civ.Proc., 28 U.S.C.A., authorizes the district courts to hold pretrial conferences designed to aid in the disposition of cases, and enter orders subsequent thereto which "control . . . the subsequent course of the action, unless modified at a trial to prevent manifest injustice." "The office [of the pretrial order] as a procedural tool [is] to insure the economical and efficient trial of every case on its merits without *chance or surprise.*" [Emphasis supplied]. *Case v. Abrams,* 352 F.2d 193, 195 (10th Cir. 1965). It "measures the dimensions of the lawsuit, both in the trial court and on appeal." *American Home Assur. Co. v. Cessna Aircraft Co.,* 551 F.2d 804,806 (10th Cir. 1977), *quoting Hodgson v. Humphries,* 454 F.2d 1279, 1281 (10th Cir. 1972). The "amendment of a pretrial order formulating issues [or designating witnesses and their proposed testimony] will be permitted during trial *only if necessary to prevent manifest injustice.*" [Emphasis supplied.] *Keen v. Detroit Diesel Allison,* 569 F.2d 547, 554 (10th Cir. 1978). The burden of establishing such manifest injustice falls squarely on the moving party. *Seneca Nursing Home v. Secretary,* 604 F.2d 1309 (10th Cir. 1979). When there exists a "properly drawn, detailed pretrial order, a trial court's determination that certain facts or issues must [or should not] be excluded from trial on the basis of a pretrial order may be reversed only if there is an abuse of discretion. *See James v. Newspaper Agency Corp.,* 591 F.2d 579, 583 (10th Cir. 1979) (pretrial order specifying the witnesses to be called may be used to bar the calling of unlisted witnesses)." *Trujillo v. Uniroyal Corp.,* 608 F.2d 815, 817-818 (10th Cir. 1979).

Pursuant to rule 83, Fed.Rules Civ.Proc., 28 U.S.C.A., the District Court of Wyoming, as well as many other district courts, has adopted rules implementing the pretrial conference procedure broadly covered by rule 16, Fed. Rules Civ.Proc., 28 U.S.C.A. Rule 8, Rules of the United States District Court for the District of Wyoming [hereinafter cited as local rules], deals exclusively with pretrial procedure. Rule 8(a) of the local rules deals with "pre-trial scheduling conferences" and provides that the parties shall:

> (2) Exchange a list of all witnesses to be called at the trial, together with a brief summary of their proposed testimony. No testimony shall be received at the trial unless it be consonant with such summary and from a witness so designated, except for purposes of rebuttal or by order of the court upon the showing of good cause why the name of the witness and the summary of his testimony was not disclosed at said pre-trial conference. *Generalized summaries are not acceptable.* Additional witnesses and summaries of testimony shall be submitted by each party to the opposing party as their names and addresses are ascertained, and at the final pre-trial conference. [Emphasis supplied].

Rule 8(e)(1) also requires the parties, in connection with the final pretrial conference, to submit a memorandum with a "list of the names and addresses of the witnesses whom the parties intend to call to testify at the trial, together with a brief summary of the testimony intended to be elicited from each witness in the trial . . ." The language of Rule 8(e)(3) spells out the sanctions for counsel's failure to comply with the rule: "Except for impeachment or rebuttal purposes and absent good cause shown, no . . . witness [shall] be permitted to testify unless his name and address appear on the witness list, together with a summary of his testimony as required by this order."

Rule 8 also advises counsel who draft pretrial orders to follow Appendix D to the Rules. Appendix D is a form of pretrial order which includes the following pertinent language:

> This pre-trial order has been formulated after conference at which counsel for the respective parties have appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing by the Court. Hereafter, this order will control the course of the trial and may not be amended except by consent of the parties and the Court, or by order of the Court to prevent manifest injustice. . . .[6]

Such local rules of practice, as adopted by the district court, "have the force and effect of law, and are binding upon the parties and the court which promulgated them until they are changed in appropriate manner." *Woods Construction Co. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888, 890 (10th Cir. 1964). Considerable deference is accorded to the district courts' interpretation and application of their own rules of practice and procedure. *Martinez v. Thrifty Drug and Discount Co.*, 593 F.2d 992 (10th Cir. 1978); *Lance, Inc. v. Dewco Services, Inc.*, 422 F.2d 778 (9th Cir. 1970). Where, however, we are "convinced that the district court has misconstrued its own rules", reversal may be warranted. Wright and Miller, *Federal Practice and Procedure*, Civil § 3153. *See also, Golgrove v. Battin*, 413 U.S. 149, 161 n. 13, 93 S.Ct. 2448, 2455 n. 18, 37 L.Ed.2d 522 (1973).

A comparison of the description of Dr. Freston's testimony in plaintiff's pretrial memorandum, with Dr. Huelke's testimony in Ford's pretrial memorandum, is instructive. Ford described its witnesses as follows on July 21, 1977:

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[6]This language does not appear in the final pretrial order entered in this case.

> Defendant does not anticipate that it will call witnesses other than a Ford engineer (either Everett Kennedy and/or Louis Tubben) and Dr. Donald Huelke. . . . Dr. Huelke is expected to testify to anticipated injuries to be expected from an accident of the type in question and compare the same to the injuries in fact sustained by the plaintiff. In connection therewith, Dr. Huelke may be asked to testify as to the speed of the vehicles involved, the force of the crash, the movement of the body of the plaintiff during the crash, and the like. Ford is advised that plaintiff intends to call Mr. Richard Crawford of Ponderosa Associates, and depending upon the nature of his testimony may call an accident reconstruction expert.
> [App., Vol. I, at p. 22].

Despite the rather specific statement that Dr. Huelke would testify as to the relationship between the accident and plaintiff's injuries, plaintiff described his last four witnesses on January 24, 1978, as follows:

> 5. Dr. William Brohm, Riverton, Wyoming, will testify as to the medical care given to the Plaintiff and as to his current condition, as well as his prognosis. (This witness has been deposed.)
>
> 6. Dr. Donald Gullickson, Lander, Wyoming, will testify as to subsequent medical care rendered to the Plaintiff, as well as to his prognosis.
>
> 7. Professor Richard Crawford, Louisville, Colorado, will testify as to the design defects and failures of the right seat and the right seat compartment of the vehicle in question.
>
> 8. Dr. Freston, University Hospital, Salt Lake City, Utah, will testify as to his medical treatment of the Plaintiff, as well as to his prognosis.
> [App., Vol. I, at p. 72].

There is no question, in our view, that the description of Dr. Freston's testimony in the supplemental pretrial submission, later incorporated in the final pretrial order [R., Vol. I, p. 112], related solely to plaintiff's injuries and prognosis *and not to* the causal relationship between those injuries and defective lap belts.

In *Meyers v. Pennypack Woods Home Ownership Ass'n.*, 559 F.2d 894, 904-905 (3d Cir. 1977), the court enunciated a series of factors which should be considered in determining whether a district court has abused its discretion in excluding, or in our case allowing, testimony not specified in the pretrial order: "(1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in court, and (4) bad faith or willfulness in failing to comply with the court's order." We address each of these factors separately.

1. Prejudice or Surprise in Fact.

In our opinion, it is noteworthy that Dr. Freston's testimony is described almost identically to that of Dr. Gullickson and Dr. Brohm. Each of these latter witnesses was deposed by Ford and each was specifically asked whether he had any opinion regarding the relationship of plaintiff's injuries and the alleged deficient design or manufacture of the automobile. Each was also asked whether he had made a study of the seat belt syndrome or read any literature in the area. Each replied in the negative to these questions. [Gullickson dep., R., Vol. XVIII, at pp. 21-22; Brohm dep., R., Vol. XXI, at pp. 12-15]. Ford knew these doctors were experts only in their fields of medicine. Thus, the addition of Dr. Freston to the list of witnesses, with the same general description of his testimony, could only have misled Ford into believing that his testimony would relate solely to

plaintiff's injuries and not to their relationship to a defective seat belt. Assuming that the pretrial order was not designed to be misleading, the fact remains that such was its effect,[7] and that it prejudiced Ford in the preparation of its defense. *See Ante* at p. 794.

Our view is not altered by Smith's contention that Wyoming custom and practice routinely allows treating physicians to testify as to the causation of injuries. We discern no major variance between Wyoming practice and this Court's decisions concerning the admissibility of evidence not properly disclosed to the opposing party either in pretrial proceedings or in response to properly framed discovery requests. *See Western Fire Insurance Co. v. Tim Force Tin Shop, Inc.*, 599 P.2d 540 (Wyo.1979); *Chrysler Corp. v. Todorovich, supra; Ford Motor Co. v. Kuhbacher*, 518 P.2d 1255 (Wyo.1974). In any event, the custom and practice in Wyoming is irrelevant. The Federal Rules of Civil Procedure control this diversity action even where there exists a conflict. *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). *See also, Walker v. Armco Steel Corp.* — U.S. —, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980). These rules, of course, were designed to make pretrial and discovery uniform across the country and to *prevent* "trial by ambush".

Parallel arguments that such custom and practice obviates a finding of surprise and therefore prejudice are also unpersuasive. First, we find nothing in the record countering Ford's claim of surprise and prejudice. Second, Ford was entitled to rely on the summary of testimony provided in the supplemental pretrial submission. The fact that Wyoming practice imputes such constructive knowledge, if indeed such is the practice, is not sufficient.

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[7] Perhaps this explains why Ford excluded Drs. Volk and Gainsford from their motion to strike recently named witnesses made on the basis of inadequate time for discovery prior to trial.

Even if plaintiff [or defendant in this case] had reason to believe that such testimony would be presented . . ., which is at best sharply disputed, that would not justify the failure . . . to respond truthfully and completely to a properly framed interrogatory. "It is no objecion to interrogatories . . . that the information sought is within the knowledge of the interrogating party." *Bowles v. Safeway Stores*, 4 F.R.D. 469, 470 (W.D.Mo.1945); *Grand Opera Co. v. Twentieth Century-Fox Film Corp.*, 21 F.R.D. 39, 40 (E.D.Ill.1957). "A distinction should not be drawn between facts with or without the knowledge of the examining party." 4 Moore's Federal Practice para. 26.59 at 26-219 (2d Ed. 1974).

Consequently, to characterize the issue here as being determined by a lack of "surprise" distorts the essential problem. The policy which prompted amendment to Rule 26(b)(4) of the Federal Rules of Civil Procedure to allow more liberal discovery of potential expert testimony was not merely for convenience of the court and the parties, *but was intended to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact.* "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947) See generally F.R. Civ.P. 26(b)(4), Advisory Committee Notes to 1970 Amendments.

In this case the expert testimony was crucial. As Judge Bartels has well put it: "Realistically speaking, the resolution of the entire case depends upon [medical] and expert testimony and opinion. The necessities of such a case transcend the usual limitations which may otherwise be imposed upon discovery proceedings." *United States v. Nysco Laboratories, Inc.*, 26 F.R.D. 159, 162 (E.D.N.Y.1960).

Weiss v. Chrysler Motors Corp., supra, at pp. 456-457. [Emphasis supplied].

See, also, Coleco Industries, Inc. v. Berman, supra, (evidence of accounting study not disclosed to opposing party in pretrial properly excluded;) *Voegeli v. Lewis, supra,* (expert witness' change of opinion was not admissible where it was not disclosed in advance of trial) ; *Tabatchnick v. G. D. Searle, supra,* (testimony of proposed new expert excluded where opponent was unfairly prejudiced).

The critical nature of Dr. Freston's testimony convinces us that Ford was prejudiced in the presentation of its case. Dr. Freston not only testified that plaintiff's injuries were caused by the seat belts; he also testified that in his opinion, based on the article he had read, the injuries were caused by a *defective* seat belt. [App., Vol. II, at pp. 271-274]. A review of the article on which Dr. Freston based his opinion [Appellee's br., App. I], makes it abundantly plain that no inference about injuries from defective seat belts, as opposed to properly functioning seat belts, can be drawn because the study did not have that type of information unless the belt actually broke or was torn by the force of the accident, which did not occur here. This is in contrast to Dr. Freston's testimony that the study examined only users of *properly functioning seat belts* and that based on data derived therefrom, the odds of pancreatic injury are only "about one in a thousand". [App., Vol. II, pp. 311-312]. Thus, Dr. Freston left the impression with the jury that Smith's seat belt was not functioning properly.

If Ford had been apprised in advance of Dr. Freston's testimony, it could have taken his deposition, discovered the article, and been well prepared at trial to cross-examine him about his conclusions.

2. *Ability to Cure.*

The challenged testimony provided crucial, non-cumulative evidence on the question of whether a *defective* seat belt aggravated or enhanced the plaintiff's injuries. This, of course, supplied the proof to a key element of Smith's theory of recovery. *Larsen v. General Motors Corp., supra; Fox v. Ford Motor Co., supra.* Without it Ford would possibly have been entitled to a directed verdict. The evidence was elicited from the first witness to appear before the jury—magnifying its impact. Dr. Freston was scheduled for examination only on the day he appeared. Counsel for Smith completed his direct examination at 4:43 p.m. Ford requested and was allowed only eleven minutes to prepare for cross-examination. The *Garrett and Braunstein* article was not available for his use prior to cross-examination.

We have previously observed that the Federal Rules of Evidence contemplate that the "full burden of exploration of the facts and assumptions underlying the testimony of an expert witness [falls] squarely on the shoulders of opposing counsel's cross-examination." *Graham, Part One* at p. 897. "Before an attorney can even hope to deal on cross-examination with unfavorable expert opinion he must have some idea of the basis of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony." *Friedenthal,* at p. 486. Finally, proper impeachment or rebuttal may have required advance knowledge so that Ford's own experts could have been consulted.[8]

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[8] Dr. Huelke did address Dr. Freston's interpretation of *Garrett and Braunstein.* We believe however that such rebuttal did not ameliorate the prejudice presented as effectively as direct impeachment through cross-examination could have.

Dr. Freston's scheduled departure the following day combined with the challenged testimony's revelation in the midst of trial significantly impaired Ford's ability to cure the prejudice. This was magnified by Dr. Freston's use of an empirical study not disclosed in advance of trial. Ford, of course, could have asked for a continuance in which to prepare, but given Dr. Freston's appointment the following day in Detroit and the nature of the testimony, adjournment may well have constituted a significant disruption in the trial of the case.[9]

For these reasons, we hold that Ford's ability to cure prejudice was significantly impaired.

3. Disruption of the Trial Process.

Dr. Freston's testimony was revealed in the midst of trial. An adjournment for depositions, when considered in light of the subject matter of the testimony and Dr. Freston's other scheduled appointments, would have resulted in a significant disruption of trial. Proper rebuttal and impeachment undoubtedly would have required the consultation of other experts and, perhaps, the enlistment of new personnel or empirical data. A short continuance, such as that allowed, while not disruptive, was inadequate. The crucial nature of the testimony required more. *See, Coleco Industries, Inc. v. Berman, supra,* at 576-577 n. 14; *Voegeli v. Lewis, supra.*

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[9]We reject any suggestion that prejudice did not occur or that it could have been cured on the grounds that "even if [defendant's] counsel [was] surprised by *who* gave the testimony, he should not have been surprised by its substance." *DeMarines v. KLM Royal Dutch Airlines,* 580 F.2d 1193, 1202 (3d Cir. 1978). It simply was not the responsibility of Ford to second guess Smith's witnesses' descriptions in his supplemental pretrial submission. On this basis, and the similarity between the description of Dr. Freston's testimony and other witnesses already deposed, we cannot hold that Ford had a duty to "police" or "doublecheck" Smith's pretrial witnesses' description, on which Ford had every right to rely.

4. Bad Faith or Willfulness.

Although there was an allegation of bad faith and willfulness imputed to counsel for Smith, [App. A, p. 4], we cannot consider it inasmuch as the trial court did not make findings in this regard. *See, Ager v. Jane C. Stormont Hospital,* 622 F.2d 496 (10th Cir. 1980). Furthermore, we do not deem remand for consideration of this point necessary. As stated in *Coleco Industries, Inc., v. Berman, supra,* at pp. 576-577 n. 14 "Here, as in *Meyers* [*Meyers v. Pennypack Woods Home Ownership Ass'n., supra*], there was no explicit finding of willfulness or bad faith. Nonetheless, unlike *Meyers,* no explanation was profferred for the failure to inform defense counsel of the [nature of the challenged testimony] prior to trial."

Despite our analysis, we seriously question whether bad faith or willfulness has an application to this issue. While it may prove aggravated circumstances, this would not necessarily create greater prejudicial impact than a negligent act not in conformance with pretrial procedure. The issue, on appeal, must be analyzed from the point of view of the prejudiced party, not vice versa.

C.

Conclusion

Balancing these factors against the wide discretion accorded the district court in both the discovery and pretrial area, we hold that Ford suffered such prejudice as requires the case to be reversed and remanded for a new trial.

REVERSED AND REMANDED.

APPENDIX A

THE COURT: What is your objection, Mr. Greenlee?

MR. GREENLEE: Your Honor, it seems that Gerry never fails to come up with a surprise, and he has done it again.

Dr. Freston first saw Mr. Smith in January of this year. He was first listed in the Supplemental Pretrial Memorandum of the plaintiff's. In that Supplemental Pretrial Memorandum, and in this list of witnesses, they tell me in January, less than two months to the trial, Dr. Freston, University Hospital, Salt Lake City, Utah, will testify as to his medical treatment of the plaintiff, to which I have no objection, as well as to his prognosis, to which I have no objection.

Now, they are now inquiring into the causes behind his injury, and they are doing it in such a way that the witness is going to say, "Yes, I have made a study of seatbelt injuries and these injuries are inconsistent with," or "consistent with"—I'm not sure what he's going to say because they haven't defined—

THE COURT: Did you take a discovery deposition?

MR. GREENLEE: No sir, there wasn't time. You know, we are a month and a half away from trial, they tell me all he's going to testify to is how he has treated the plaintiff and how he is going to treat him in the future.

That, you know, we admit Mr. Smith was injured. There is no question about that. I don't have any problem, and you haven't heard one objection from me on this witness until this point in time. I certainly would have—

THE COURT: I think you admitted he was injured in the accident, didn't you?

MR. GREENLEE: Yes. Yes, he was. But now they are trying to pinpoint, you see, those injuries. Now that's unfair.

THE COURT: Do you contend that pancreatitis occurred in some other region?

MR. GREENLEE: The pacreatitis occurred because the various organs in the abdominal cavity were injured when Smith was violently thrown forward, the inertial forces created by that accident caused those organs to rip and tear loose and to bang into each other in the abdominal wall and whatnot.

They were not caused, we contend, by direct application of force from the seat belt, which is where the plaintiff wants to go with this witness.

THE COURT: What is the basis of your objection, Greg? Is it because you are claimnig the doctor is speculating?

MR. GREENLEE: Well, that's one. The first objection is, their listing of this doctor had nothing to do with what they are now calling him to testify to, to wit, the causes of the injury. That's not in here.

They simply talk about treatment, past treatment and future treatment. And so it's a surprise to me.

I haven't had a chance to prepare, I haven't had a chance to take a deposition. I didn't take a deposition because there was no indication here that he would be so called to testify.

Second of all—

THE COURT: Let me say this. He did just testify that the overwhelming weight of the facts—I think is the way he phrased it—was that the injuries resulted from the accident.

MR. GREENLEE: I don't have any problem with that. I do not dispute that the pancreatic problems arose from the accident.

But now they want him to go further and say what specifically in that accident caused that injury. And that I

object to because I have had no opportunity to prepare, I'm surprised, and, furthermore, in the five-year period the doctor is speculating.

THE COURT: Is that the bulk of your objection?

MR. GREENLEE: That's the bulk of it.

THE COURT: Gerry?

MR. SPENCE: Judge, he says he's surprised. I guess I'm more surprised than he is because I have never been into a court of law in my life but what the medical doctor was asked to give a casual opinion as to the cause of the injury.

That goes without saying. Medical doctors have to give some testimony.

You know, if you don't they would say, "This man isn't qualified"—as soon as they put Crawford on they will say, "Well, he isn't a doctor," and ask him what he thinks caused the injuries. You watch and see what kind of an objection we get there.

I do admit that we are out of order, and I do tell you we will tie it in with other evidence. But he is here and we have the intent of having him testify as to his opinion based upon reasonable medical probability as to the cause of these injuries and the mechanism involved.

THE COURT: With regard to the surprise, I'm going to allow the witness to testify on this. I think that what you are really saying, Greg, is that under our system of telling each other what a witness is going to testify to is a bad system, and I agree to that.

Ever since the Federal Rules were adopted in this state, we have basically, in listing witnesses in pretrial memoranda, have said as little as we could about what they would really testify to.

But I agree, you are basically right. We should do it better. We haven't. It hasn't been our custom.

I'm going to try to make it better, but we haven't objected here. So I don't see where we can really truthfully claim surprise here, because, as Mr. Spence says, I do think that we have gone into this question as to the causal condition with doctors always.

Now, as to your second objection on foundation, I'm not sure yet, I haven't heard all the foundation, I don't know whether—I can't say whether Dr. Freston is speculating or not. The foundation isn't complete. So I can't rule on that.

MR. MORIARITY: Greg can cross-examine on that point.

MR. SPENCE: He has the right to voir dire.

MR. GREENLEE: I have not had the opportunity to examine him before. You know, it's extremely scary when you get a witness that you've never ever talked to.

I shook his hand for the first time in this courtroom after lunch.

MR. SPENCE: I have never seen any of yours.

MR. GREENLEE: But their depositions were taken by your people.

MR. SPENCE: Some of them were and some weren't.

MR. GREENLEE: It seems to me that this is a critical issue to the defendant's defense. Now, certainly I can get up there and ask him, "Doctor, what about these seatbelt injuries and what not," but all I'm doing there is compounding the problem that I already have.

Your Honor, I try to be fair with listing what my people are going to say and try to include those areas, all of those areas that they are expected to be called upon to testify to. That was not done in this case.

I submit to you that it was an intentional—

MR. SPENCE: On, [sic] Greg, don't say that.

MR. GREENLEE: —an intentional withholding of information from me on which I would have reacted entirely differently had they said "and the causes of his injuries."

THE COURT: Basically, you see, I'm ruling that the tail goes with the hide. You let without objection in the doctor's testimony it was attributable to the accident.

"What is the cause of his pancreatitis?"

"The accident was."

All right. You've got that in and there's no objection. Now here is a refinement of that and I just basically think that that's what it is, is a refinement of it. That's why I say it's something that maybe we're at fault in not requiring that pretrial memoranda in greater detail.

But basically I think that has not been the Wyoming practice, and I think we will have to live with it, at least in this case. Gentlemen, let's move.

WILLIAM E. DOYLE, Circuit Judge, dissenting.

The sole issue which is relied on by the majority for reversal is whether an alleged trial error consisting of the giving of an incomplete or general statement as to the testimony of a proposed expert witness, in conjunction with the naming of the witness in the plaintiff's pretrial statement, can justify the reversal of a judgment rendered following a lengthy and difficult trial and the award of a highly substantial verdict. There is not the slightest contention that the evidence is insufficient or that the claim is ill founded. Nor does it appear that the defendant made any effort by deposition or other means to obtain a detailed statement of the proposed testimony of the expert.

Some preliminary elements need to be delineated:

A.

JUSTICE DELAYED

These injuries occurred in 1973. There was a prior trial involving the wrongful deaths of the wives of the plaintiff Smith and the driver of the automobile in question, Mr. Fox. Here, we are well into the year 1980, and the end is not in sight. At the new trial there would not be any great difference, if any, in the facts. At the retrial either the testimony of Dr. Freston in person or his former testimony given at the trial below will be offered. It boils down, then, to whether or not the plaintiff is to be punished to this extent because of the action of his lawyer in not detailing the projected testimony of Dr. Freston rather than merely describing it in general terms. Note also that this is not a case in which there was a failure to endorse the name of a witness, as a result of which surprise was claimed by Ford at the trial. We expect to show that there was no surprise in fact, conceding that the statement was not full and complete.

B.

SURPRISE IN FACT IS NOT DEMONSTRATED

Ford mainains that it had only 1½ months to prepare itself, and thus its failure to take a deposition should not be counted against it. This is incorrect. The witness in question, Dr. James W. Freston, was in fact endorsed not quite 2½ months prior to the trial in late March. This notice was given at a supplemental pretrial conference held on January 24, 1978. Does the time span of not quite 2½ months prior to trial constitute a justification for failing to probe the details of Dr. Freston's testimony? Counsel for Ford were aware of the fact that the plaintiff, Mr. Smith, was, at that very time, being treated by Dr. Freston and was in personal contact with Dr. Freston. Certainly, this was worthy of some inquiry. But, counsel for Ford made no move, for-

mal or otherwise, to ascertain the details. Granted, the notice was cryptic and conclusory. This raises the question whether it is permissible in an adversary proceeding such as this for the attorney for the defendant to ignore a notice which gives the name and general nature of the testimony of an expert and to run the risk incident to not making inquiry as to the details of the testimony, notwithstanding that a mere demand submitted to the judge would have compelled the plaintiff's lawyer to reveal in every detail the proposed testimony of the expert. Thus, it would not have been necessary for Ford to take a deposition. Certainly, it was hazardous in a case of this magnitude for Ford's counsel to elect to run the risk of having to cope with damaging testimony for which no specific preparation had been made (so it is claimed). Of course, there had been preparation. Ford had brought in an expert from the University of Michigan Medical School, Dr. Huelke, who was fully prepared to refute any testimony dealing with the seat belt as a cause. Perhaps this latter fact accounts for Ford's decision not to pursue the deposition.

The doubling of the damage demand by counsel for Smith to one million dollars, which took place virtually simultaneously with the listing of the witness, gave added notice to Ford that plaintiff did not believe that there existed a void in the testimony.

Accordingly, we have a setting in which a case had been carefully prepared over a long period of time and which was in the last weeks of preparation. The issues were fully understood. Ford knew about the problem of cause as applied to the seat belt because the main deficiency relied on by the defendant [sic] was this specific element. Also, Ford was prepared to meet this issue. The fact that Ford was ready detracts from the claim of Ford that it was surprised.

The witness who was endorsed, Dr. Freston, was not any ordinary internist. He was an expert in the particular field and in this particular part of internal medicine. He

has not only an M.D. degree, but a Ph.D. as well, and he was Chairman of an important department of the University of Utah Medical School. Surely none of this was ignored by Ford.

C.

THE IMPORTANCE OF THE TRIAL COURT'S FINDING

A third factor which is entitled to be weighed is the finding of the trial court that surprise did not exist. In view of the specialty of Dr. Freston and the peculiarly serious injuries of Smith, including extensive injuries to the pancreas, which could be fatal, and removal of the spleen, there was good reason for counsel to be generally aware of the foregoing testimony and to expect testimony as to causation. This issue was anticipated of each of the other medical witnesses who were deposed.

D.

FORD'S ELECTION NOT TO OBJECT WHEN DR. FRESTON WAS ASKED A GENERAL QUESTION ABOUT PROXIMATE CAUSE

A timely objection to the testimony of this witness was not given. Counsel waited until Dr. Freston had testified to one phase of proximate cause, that which had to do with the automobile collision as a cause of the injuries which were the subject of the lawsuit. Objection was not made until the question of cause as it related to the seat belt was introduced. Only then did counsel for Ford claim surprise. The trial court considered this a waiver of objection.

E.

SURPRISE WAS NOT ESTABLISHED

Finally, the trial court had lived with this case and the predecessor. Having worked closely with the lawyers, the judge was in a good position to make a finding on the existence or nonexistence of surprise. Not a scintilla of evidence on the subject of surprise was offered by Ford. No detailed inquiry was conducted, no witness was presented, and so the reversal rests on an analysis by the majority of the circumstances surrounding this incident to the extent that they are able to squeeze favorable inferences from the basic facts, plus the mere *claim* that was made by counsel. This isn't much.

The circumstances at the trial do not bespeak surprise. Not only was it brought out that Dr. Donald F. Huelke, Ford's expert witness, was fully prepared on the general subject of seat belt cause, he was also ready to refute the testimony of Dr. Freston that the position of the seat belt produced the serious internal injuries. Dr. Huelke was even familiar with the Garrett and Braunstein article (the literature on which Dr. Freston relied).

The case of *Tupman Thurlow Co. v. S. S. Cap Castillo,* 490 F.2d 302 (2d Cir. 1974), considered whether the party claiming surprise was prepared to cope with the evidence to which objection was made, which fact was considered pertinent in deciding whether in fact there was surprise.

* * * * * * *

The prelimanry facts which are stated raise a question as to why Ford refrained from deposing Dr. Freston, and whether Ford should be allowed to refrain from making any effort to ascertain the details of the testimony of an expert who is listed and to rely entirely on the initiative of the plaintiff in bringing each and every detail to its attention. Ford would say that it was so misled by the statement that it did not consider it necessary to act. This ignores the

complexity of the case, for example, the fact that the causation issue was foremost in the minds of both lawyers. A distinguished physician was named and thorough preparation required every possibility to be examined. It is unnecessary for the adversary party to take obvious steps to protect its position? Neither side should, consistent with the spirit of the rules, be allowed to sit back and fail to take obvious action to ascertain facts. To fail to do so suggests an attempt to use the rules for the object of developing an error. The trial court was of the view that neither side was genuinely surprised, that each was trying to outmaneuver the other. If this was the case, there should not be a reversal because this punishes the innocent litigant.

The important guide to the duty to supplement requests for discovery is subsection (e) of Rule 26, an amendment which was added in 1970. It states that "A party who has responded to a request for discovery wtih a response that was complete when made is under no duty to supplement his response" except in two instances: 1) where the question is addressed to the identity and location of persons having knowledge of discoverable materials; 2) to identify each person who expects to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.[1]

Professor James Moore in his Treatise, Moore's Federal Practice Section 26.81, explains the purpose of the amendments:

> Subdivision (e) of Rule 26 was added in 1970 to end the uncertainty that had developed over the duty to

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[1] The text of Rule 26(e)(1) is as follows:

> (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter in which he is expected to testify, and the substance of his testimony.

> supplement. This provision imposes directly the duty to supplement answers to interrogatories seeking the identity and location of persons having knowledge of any discoverable matter, and answers to interrogatories seeking the identity of persons expected to be called as expert witnesses at the trial and the substance of their expected testimony. Further, when a party who has answered interrogatories discovers that the answers were incorrect when given, he has a duty to amend them to conform to the truth.
>
> Along the lines suggested by Judge Ellis in *Gorsha* [*v. Commercial Transport Cpr.*, 38 F.R.D. 188 (E.D.-La. 1965)], the subdivision also provides that under circumstances in which failure to provide subsequent information would be *"in substance a knowing concealment"* there is a duty to supplement the answer though it was correct when made.
>
> Flexibility is provided by a provision in subdivision (e)(3) that the duty to supplement answers may be imposed by the court or by agreement of the parties. Of course the parties are free to serve new interrogatories requesting supplementation of the answers to the earlier set. (Emphasis supplied.)

Does the majority opinion impose an absolute and *exclusive* duty on a party to supplement answers to interrogatories or to amend them? It does this and more. The failure to detail the testimony, according to the majority can be likened to an offense *Malum in se*. It calls for imposition of the extreme penalty regardless of whether surprise, prejudice or willfulness is established.

The First Circuit in *Simonsen v. Barlo Plastics Co., Inc.*, 551 F.2d 469 (1st Cir. 1977), considered the consequence of plaintiff's failure to disclose the complete substance of an expert witness's testimony. It held that the consequence was within the trial court's discretion. The

plaintiff in *Simonsen* had not given notice that his expert would testify to permanent unemployability of the plaintiff. The defense sought a recess in order to find a vocational rehabilitation expert. The trial court denied the motion seeking delay and the First Circuit affirmed. The court said:

> PSCo argues that it should not be bound by the pretrial order as it was surprised by testimony of plaintiff's expert, Arthur Kenison, that Simonsen might be permanently unemployable. . . . At the time the list of expert witnesses was filed, Simonsen is said to have been working on and off as a truck driver so that PSCo had no reason to anticipate any need for testimony about vocational rehabilitation. However, PSCo was informed over five months prior to trial that Kennison would be testifying as an expert and, *through discovery,* could have ascertained the substance of his testimony. . . . Moreover the complaint had alleged permanent disability. Clearly the court did not abuse its discretion in refusing to hold up the progress of the trial for the testimony of the unlisted and as yet unlocated expert. [Emphasis supplied.]

551 F.2d at 471.

Simonsen thus places the burden on the defendant to take the initiative by deposing the witness—just the opposite of the position taken by the majority here.

The situation is far different where the expert witness is unknown and an effort is being made to call him after having failed to name him. *See Davis v. Duplantis,* 448 F.2d 918 (5th Cir. 1971). But in that case the trial judge allowed the expert to testify notwithstanding failure to list his name as a witness in accordance with the pretrial order. The Firth Circuit upheld the ruling, noting the severity of the sanction which denies the testimony. Thus, the

court weighted the consequences of precluding the calling of the witness against the magnitude of the violation of the rule and decided that the discretion of the trial court should be upheld. The Fifth Circuit was also persuaded by the fact that the plaintiff's counsel knew that the doctor was a potential witness since he had been furnished a report before the trial and had had an *opportunity* at that time to depose him.

The Seventh Circuit has also had occasion to rule on the subject of failure to name the witnesses where knowledge of expertise was not discovered until time of the trial. *See Sadowski v. Bombardier Ltd.*, 539 F.2d 615 (7th Cir. 1976). The witnesses in that case had been listed in the pretrial order, but had not been listed as experts. The court noted that the question was a close one, but observed that the testimony became significant during the trial and this tended to excuse the lateness of their being treated as experts. Again, the exercise of the trial court's discretion was upheld.

This court had occasion to consider the admissibility of material which had not been disclosed in a supplement to a response given in answer to an interrogatory required by Rule 26(e) in *Price v. Lake Sales Supply R.M., Inc.*, 510 F.2d 388 (10th Cir. 1974). We stated:

> It is quite true that parties are under a continuing duty to supplement their responses. See 4 J. Moore, Moore's Federal Practice [Section] 26.81 (1970). Rule 26 clearly requires this. There is no indication, however, that the trial court believed that this failure to amend was a knowing concealment. In any event, it is questionable whether exclusion is the only proper penalty for failing to comply with the requirement. Surely the trial judge has some discretion in selecting the sanctions and it does not appear that the court abused its discretion in this instance.

510 F.2d at 395. We thus recognized in that case the importance of the fact that there was a lack of evidence showing a knowing concealment. It was also recognized that the use of the exclusion sanction was questionable and that the trial judge should have some discretion in selecting sanctions and that in that instance there was no reason to conclude that there had been an abuse of trial court discretion.

The majority opinion cites, among other cases, the Fifth Circuit's decision in *Shelak v. White Motor Co.*, 581 F.2d 1155 (5th Cir. 1978). In that case the trial court's discretion was determined to have been improperly exercised in allowing the testimony of plaintiff's expert witness, which testimony connected the plaintiff's back injuries to an accident on a defective step and also connected a heart attack to the same accident. The evidence of the causal connection of the heart attack arose on the date of the jury selection. It is understandable that the testimony in the *Shelak* case, considering the date on which it arose, and the nature of it, justified the trial court's decsion that it should be rejected. However, even in that extreme situation, there was a divided court. Judge Rubin dissented on the ground that the trial court's discretion in allowing the evidence should have been upheld. In the *Shelak* case the trial court had also allowed a witness to testify who had not been named. The Fifth Circuit ruled that receipt of this evidence was not reversible error because it did not appear that there was surprise and thus prejudice. *See* 581 F.2d at 1159. Thus, the *Shelak* case is at odds with the proposed opinion in this case, which holds that it was error for the trial court to allow Dr Freston to testify even in a situation in which surprise was far from clear.

Weiss v. Chrysler Motors Corporation, 515 F.2d 449 (2d Cir. 1975), is relied on by the majority as upholding the right of a reviewing court to void the exercise by the

trial court of discretion on a matter such as is presented. It is to be noted, however, that the *Weiss* case involved broad and general notice as to what the witness was going to testify to. Actually, the Second Circuit in the *Weiss* case ruled that this was not reversible error. The case was reversed for error in refusing to admit proffered evidence in rebuttal, which evidence was admissible as a matter of right and which did not become pertinent until the rebuttal. 515 F.2d at 458, 459.

The majority opinion also relied on the case of *Voegeli v. Lewis,* 568 F.2d 89, 96 (8th Cir. 1977), a malpractice case in which one of the expert witnesses for the defense changed his testimony between the time of his deposition and the time of trial. The defense had demanded through interrogatories the nature of the testimony which was being offered. The answers were inadequate and the court granted a motion to compel answers, but, again, the answer was inadequate and misleading. A second set of interrogatories was denied enforcement by the court. Also, the court allowed the defendant to call another witness, although, previously, counsel for the defendant had indicated that he would not be called, as a result of which there had not been voir dire examination of the jury concerning the witness. The Court of Appeals for the Eighth Circuit reversed the case and remanded it to the trial court, saying that there had been an abuse of discretion by that court growing out of the trial court's having failed to enforce its original order compelling answers to interrogatories in the case of one of the experts who changed his testimony. The court said, in addition, that the plaintiff was deprived of the opportunity to voir dire with respect to the other expert. *Voegeli* is so complex and different from the case at bar that it is not an effective authority in this case, which is limited to an objection to allegedly surprise expert testimony, the substance of which was claimed to have produced surprise.

There is one other complaint by the majority and that is that Ford was allowed only 10 minutes to prepare cross-examination. The majority does not mention the fact that the 10 minutes was all that was requested. Moore's Federal Practice paragraph 59.08[2] states that the surprised party should move for a continuance at the time of the surprise or otherwise he will be considered as having waived his objection. The cases cited by Moore are *Jackson v. MFA Mut. Ins. Co.*, 169 F.Supp. 638 (W.D.Ark.1959); *Campbell v. District of Columbia*, 153 F.Supp. 730 (D.D.C.1957), *aff'd* 245 F.2d 357 (D.C.Cir. 1958); *Dow v. Carnegie-Illinois Steel Corp.*, 70 F.Supp. 1016, 1019 (W.D.Pa.1947), *rev'd on other grounds*, 165 F.2d 777 (3rd Cir. 1947); *Beardsley v. Howard & Bullough American Mach. Co.*, 176 F. 619 (C.C.D.R.I.1910). *Cf. Tabatchnick v. G. D. Searle*, 67 F.R.D. 49 (D.N.J.1975).

In summary:

The finding of the trial judge that surprise was non-existent is of high importance for these reasons:

1) The cases show that actual existence of surprise is essential. Also necessary is, of course, prejudice.

2) Constructive surprise, as discussed in the majority opinion, without more, surely is not enough. Surprise implied in law will not suffice. The surprise must be real.

3) The evidence of surprise is meager. There exists, of course, the claim made in open court by Ford's counsel, but this is not evidence. It is merely an allegation. If, indeed, this seasoned and experienced trial lawyer was surprised, that indeed would be surprising given the exposure that he has had in this case. In fact, both sides have lived with the case for many years and they were sensitive to the issue of seat-belt-cause alleged by plaintiff and defended by Ford. Both sides knew that plaintiff had to come forward with evidence establishing that the seat belt caused the harm. Furthermore, the conduct of counsel for Ford

during the trial showed that he was alert to the issue and indeed apprehensive about the special testimony of Dr. Freston on the subject, for he was quick to distinguish between general causation and the specific causation involved here.

In the face of the foregoing, how can the majority demonstrate the plain error necessary to a substitution of its judgment for that of the trial court?

We mention one final point. The Rules of Civil Procedure do not allow counsel on one side to depend on his opponent for every item of evidence that the opponent is going to offer. The Rules contemplate the identification of witnesses and subject matter so as to permit the adversary to take depositions or to seek interrogatories or move for a more detailed statement as to what the evidence is going to be, but all of these avenues are open and to place all of the burden on the plaintiff to the detriment of his client is, to say the least, grossly unjust.

In closing, there is no gainsaying that the sanction imposed was excessive considering the circumstances, including the length and difficulty of the trial and the fact that there is no real issue as to Ford's liability.

This was a well conducted trial, as lengthy and complex trials go. Unfortunately, it is impossible to have a perfect trial, human fallibility being considered. This is especially true from the standpoint of technical perfection. This does not mean that perfection should not be sought after, but there is not an indication that this goal was ever abandoned in the present case.

For all of these reasons, I respectfully disagree with the reasoning and conclusion of the majority opinion.

APPENDIX B

APPENDIX B

Rule 26. General Provisions Governing Discovery.

(a) Discovery Methods. * * *

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* * * *

(2) *Insurance Agreements.* * * *

(3) *Trial Preparation: Materials.* * * *

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) * * *

(B) * * *

(C) * * *

(c) Protective Orders. * * *

(d) Sequence and Timing of Discovery. * * *

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) . . . . (B) the identity of each person

expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

* * *

Rule 703. Bases of Opinion Testimony by Experts.

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.